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REPORT

OF THE

COMMISSIONERS ON THE CONTROVERSY

WITH THE

STATE OF NEW-YORK,

RESPECTING THE

EASTERN BOUNDARY

OF THE

STATE OF NEW-JERSEY.

October 30, 1807.

TRENTON:

RE-PRINTED BY WILLIAM L. PRALL.

1826.

REPORT

OF THE

COMMISSIONERS, &c.

To the Honorable the Legislature of the state of New-Jersey.

THE Commissioners appointed on the part of New-Jersey, to settle, with commissioners appointed on the part of New-York, the jurisdictional boundary line between the two states, beg leave to REPORT,

That the said commissioners, under their respective authorities, met at Newark, in New-Jersey, for the accomplishment of the end for which they were appointed, and that, after long discussions, all attempts to procure an amicable adjustment proved entirely abortive.

Your commissioners hope that the honorable the legislature will not disapprove of the breaking up of further conference, after it had fully appeared that the commissioners on the part of New-York had resolved not to depart from their claim *over the whole waters lying between the respective states, including shores, roads, and harbors within the natural territorial limits of New Jersey.*

Your commissioners further beg leave to state, that they could not assent to the conclusion drawn from the fact asserted by New-York, that possession, both *before* and *since* the revolution, was in conformity to their present claim—

1st. Because notorious acts of possessions existed on the part of New-Jersey, and were evident to the senses of every man along the whole of the shores, opposite to New-York and the adjoining waters, that were fully equivalent to those asserted on the foundation of the senses of the commissioners of New-York.—And

2d. Because the right of jurisdiction over these shores and waters, and which is the subject of the present controversy, was unquestionably a *jus regium*, or royal prerogative right, actually possessed by, and vested in the crown of Great-Britain, and exclusively exercised by its board of trade and navigation, without the intervention of either of the colonial governments, at the time of the declaration of independence; and consequently, that this right had never been possessed or exercised by the government of the colony of New-York, at that time; and, in respect to the time since that period, no acts of jurisdiction have appeared on the part of New-York, or of *acquiescence* on the part of New-Jersey, which in

the opinion of your commissioners, could give to New-York any claim from *possession* (without pretence of any charter or grant) to a preferable right of jurisdiction over the shores and waters in question, after that of the crown of Great-Britain had ceased, when such jurisdiction *naturally* must belong to the sovereignty of the adjoining country.

Neither could your commissioners perceive, from the arguments adduced on the part of New-York, or from their own reflections, how they could justify themselves in compromitting the essential interests of the state, by admitting—

1st. That New-Jersey, when she acquired her independence, did not acquire the rights of employing commerce from, and creating a defence on her own shores; seeing that such rights are necessary for revenue and security, and are incident to freedom and sovereignty, and that without them these justly valued attributes could not long be maintained, should these United States, now happily connected in a federal bond, ever become unconnected and conflicting powers.

2d. By admitting that the grants from the duke of York to lord Berkeley and sir George Carteret, and their successors, for the colony of New-Jersey, although *not* from the *king*, but from a *subject*, were to be construed, *not* acording to the known general rule of the common law, which would carry the grantees to the middle of the river or channel, agreeably to the express intent of the grantor, but according to an exception to the general rule, which has been called the *prerogative rule*, (and which applies only to grants made by a *king*, and is never applicable to grants made by a *subject*,) and which would restrict the grantees to the high-water mark.

It will be perceived that the commissioners on the part of New-York would not agree to any general jurisdictional line, inconsistent with the principles set up by them, although they consented to receive proposals for extending accommodations, in some particular cases, which might be shewn to be beneficial to citizens of New-Jersey, and not injurious to New-York.

To treat *afterwards* for any such benefits, appeared to your commissioners an admission of each and every of the principles contended for by New-York, and combatted by New-Jersey, as contained in the following sheets.

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

October 30, 1807.

No. I.

GENTLEMEN,

In addition to the general fact, "that New-York has always, and without any claim by New-Jersey, exercised jurisdiction over the whole of the waters between the shores of the two states;" we have judged it proper to state particularly the following matters in writing, previous to any verbal conferences between us.

King Charles the second, claiming the country comprehending the shores and waters in question, then held by the Dutch, and to which they had given the name of *New Netherland*, granted, *inter alia*, a part of it to his brother, the duke of York, on the 12th March, 1663-4, by the decription of "All that island or islands commonly called by the several name or names of Matowack's or Long-Island, situate and being towards the west of Cape Cod and the Narrow Higansetts, abutting upon the main land, between the two rivers, there called or known by the several names of Connecticut and Hudson's river, together, also, with the said river called Hudson's river, and all the land from the west side of Connecticut river to the east side of Delaware Bay," with certain powers of government or sovereignty.

The duke, by lease and release of the 23d and 24th June, in the same year, conveyed a part of the above lands to lord Berkeley and sir George Carteret, by the description of "All that tract of land adjacent to New-England, and lying and being to the westward of Long-Island and Manhattan's Island, and bounded on the east part by the main sea, and part by Hudson's river, and hath upon the west Delaware bay or river, and extendeth southward, to the main ocean, as far as Cape-May, at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is forty-one degrees and forty minutes of latitude, and crosseth over thence in a straight line to Hudson's river, in forty-one degrees of latitude; which said tract of land was thereafter to be called by the name or names of New-Cæsarea or New-Jersey."

This conveyance is the foundation of the claim of New-Jersey, and the questions arising on it between the two states, and which we conceive to be the subject of the present controversy, are—

First. Whether that portion of the boundary expressed, *part by the main sea, and part by Hudson's river*, is a line commencing at the intersection of the forty-first degree of latitude, with the western shore of Hudson's river, and extending thence along the shore to the mouth of the river, assumed to be at the southern extremity of Manhattan Island on the east, and *Constable's Hook*, or whatever other may be considered as the corresponding or opposite point on the western shore, on the west, or a line commencing in, and extending through the channel of the river? or, in other words, whether the *littus*, the high-water mark, or the *filum aquæ*, the channel, is to be adjudged the boundary?

Secondly. Whether the line, after it leaves the river, be it either high-water mark or the channel, is to pass on the eastern or western side of Staten-Island?

The last question may be viewed as resolving itself into another, namely: whether the water which, in the phraseology of the grant hereafter cited, *parts Staten Island and the main*, commonly known as the *Sound*, is not a portion of the main *sea* intended in the conveyance?

Van Der Donck, a Dutch writer, was in New-Netherland some years, and published his description of it in 1656. After having noticed Delaware bay, he proceeds:—"Now to pass over to the bay, in which the East and North rivers fall into together, and *in which Staten*-Island lies—and because it is the most frequented and most populous, and in and through it the most trade and traffic is carried on, and also because it lies in the middle of New-Netherland, so it is *quasi per excellentiam* called *the Bay*—it is the more famous, for there the East and North rivers fall in together, being two very fine rivers—to be hereafter more particularly described; together with several kills, guts, and creeks, and some of them to be likened to small rivers, and also navigable; as the Raritan kill, the kill of the Cul, Neversink, &c.: besides, that in this bay more than a thousand ships of burthen may, and all within the land, make an harbor, and may lay handsomely, safe from dangerous winds.—The entrance into the bay is wide enough, and to be found without much danger, readily, by those who have once been there, or have been well directed respecting it; and one can often with ease, if so minded, and the wind serves, immediately sail up, with one and the same running tide, from the sea to before the city of New-Amsterdam, which is five miles from the open sea, with full lading, however large or burthensome the ships may be, and in like manner return again to sea; but in going out it is usual to come to under Staten-Island, at the watering place, to lay in a stock of water and wood, of both of which there is a sufficiency to be had."—"One may come so far in the bay, behind Sandy-Hook, to take advantage of the wind and tide, and wait for the last messengers with letters."

New-Netherland was conquered from the Dutch, by the English, on the 27th August, 1664; and Nicolls, who commanded the armament, immediately on the conquest, and in consequence of a commission from the duke, of the 2d of April preceding, entered on the exercise of civil government throughout the whole of the territory comprised in the grant of the duke, under the style of his *Deputy Governor*.

The letter from the duke to Nicolls, notifying him of the conveyance to lord Berkeley and sir George Carteret, or, as they and their assigns have been usually denominated, the *proprietors*, is dated on the 28th November, 1664; but when in the intermediate time before the arrival of Philip Carteret, the first governor under the *proprietors*, in the ensuing summer it came to his hands, does not appear.

On the 1st December, in the same year, he granted to Baker and his associates, a tract of land described as follows:—"A parcel of land, bounded on the south by a river, commonly called the Raritan's river, on the east by the sea, which parts Staten-Island and the main, and to run northward up after Cull bay, till you come to the first river, which sets westward out of the said bay, and to run west into the country, twice the length of the breadth thereof, from the north to the south of the aforementioned bounds."

The *water*, parting Staten-Island and the main, in the grant denominated *sea*, had, in the Indian deed, procured by the grantees, in consequence of a previous license from Nicolls, and on which the grant was founded, been denominated a *river*. This grant, as it regards a large portion of the land granted by it, has been usually distinguished as the *Elizabeth-Town grant*, and the claimants under it as the *Elizabeth-Town people*.

The *proprietors*, as soon as this grant came to their knowledge, objected to it, that the duke, having already sold and conveyed away the lands to them, there was no title in him at the time, and consequently the grant a nullity. The *Elizabeth-Town people*, however, persisting to maintain it, on the ground, that they had purchased the Indian title, and that the grant had thereupon regularly passed to them before any notice, either to Nicolls or them, of the prior alienation by the duke. A litigation between these parties respecting it took place, and which still subsisted at the commencement of the American revolution; and if it is now to be considered as having ceased, it is to be attributed either to that event, or to a length of possession under the grant, or other circumstances the effect of a lapse of time; and in a very early stage of it both the king and the duke gave their aid to the *proprietors*, by formal printed declarations, in opposition to the claims of the *Elizabeth-Town people*.—Governor Lovelace, of New-York, in order to extinguish the claims of the Indians to Staten-Island, made a formal purchase of it from them, in behalf of the duke, on the 13th April, 1670. A partition of the entire tract conveyed by the duke to lord Berkeley and sir George Carteret, having taken place, and the eastern moiety, or East New-Jersey, having thereupon become the purpart of sir George, the duke, to the intent of *further assurance*, executed three successive releases for it—one to sir George himself, on the 29th July, 1674, with the following description of its eastern boundary:—"bounded on the east part by the main sea and part by Hudson's river;" another to his grandson and heir, on the 10th September, 1680, and the third to the earl of Perth and others, the then *proprietors*, on the 14th March, 1682, with the following description of boundary in each:—"Extending eastward and northward along the sea coasts, and the said river, called Hudson's river, from the east side of a certain place or harbor, lying on the southern part of the same tract of land," (the entire tract conveyed by the original conveyance from the duke to lord Berkely and sir George Carteret) "and commonly called or known in a map of the said tract of land, by the name of Little Egg-

Harbor, to that part of the said river, called Hudson's river, which is in forty-one degrees of latitude."

Nicolls, by grant of 23d December, 1667, after a recital in these words, "Whereas there is a certain island within this government, lying and being in Hudson's river to the west of Long-Island, between Nutten Island and the main, and south south-west from this fort, commonly called and known by the name of the Great Oyster Island, it being the biggest of the three small islands which lie there, near or adjacent one to another, to which said island there appears not to be any particular lawful owner, either natives or others, who have just title, or do lay claim to the same," grants it to Robert Needham. This grantee, the day after it, conveys it to Isaac Bedlow, whose name it has borne from that time hitherto.

Governor Andros granted Little Oyster Island, being the second in size of the three Oyster Islands, known also as Bucking Island, to William Dyre. The date of the grant in this instance, is, as it respects the month and the unit of the year, left blank in the record of it.

In 1683, a body, exercising legislative authority in the colony of New-York, under the style of the *Governor, Council, and Representatives*, passed sundry acts, and among them one entitled, "An act to divide this province and dependencies into shires and counties," with the following descriptions of the boundaries of the city and county of New-York and the county of Richmond. "The city and county of New-York to contain all the island commonly called Manhattan Island, Manning's Island, and the two Barn Islands; the city to be called as it is, New-York, and the islands above specified the county thereof."—"The county of Richmond to contain all Staten-Island, Shooter's Island, and the islands of meadow on the west side thereof."—These acts were re-enacted in 1691, and as it respects Richmond county, in the same terms; but as it respects the city and county of New-York, with the following variance:—"The city and county of New-York, to contain all the island commonly called Manhattan's Island, Manning Island, and the two Barn Islands, and the three Oyster Islands;—Manhattan's Island to be called the city of New-York, and the rest of the islands the county."

The charter to the city of New-York, 1686, contains the following description of its boundaries:—"The city of New-York, and the compass, precincts, and limits thereof shall extend and reach itself, as well in length and in breadth as in circuit, to the furthest extent of and in and throughout all that the said island Manhattans, and in upon all the rivers, rivulets, coves, creeks, waters, and watercourses belonging to the same island, as far as low-water mark"—and grants to the corporation "all the waste, unpatented, and unappropriated lands lying and being within the said city, and on Manhattan's Island, extending and reaching to the low-water mark, in, by, and through all parts of the same city and Manhattan's Island aforesaid."

The charter of 1708, grants to them "all the vacant and unappropriated ground lying and being on Nassau Island alias Long-Island, from high-water mark to low-water mark, contiguous and fronting the said city, from a place called the Wallabout to the Red-Hook, over against Nutten Island, that is to say, from the east side of the Wallabout, opposite the then dwellinghouse of James Robine, to the west side of the Red-Hook, commonly called the fishing place." And notwithstanding, both as it respects Manhattan's Island and between the Wallabout and Red-Hook, on Long-Island, the whole of the upland, or lands immediately bordering on, or expressed to be bounded by the adjacent waters, or respective rivers, had been priorily granted to private persons, the *title* of the corporation, as under these grants, to the land between high and low-water mark, has never been questioned.

The charter of 1730, contains the following description of the boundaries of the city:—"To begin at the river, creek, or run of water called *Spit Den Duyvel*, over which King's Bridge is built, where the said river or creek empties into the North river, on the West-Chester side thereof, at low-water mark, and so to run along the said river, creek, or run, on West Chester side, at low-water mark, into the East river or Sound, and from thence to cross over to Nassau Island, to low-water mark there, including Great Barn Island, Little Barn Island, and Manning's Island, and from thence all along Nassau Island shore, at low-water mark, unto the south side of the Red-Hook, and from thence to run a line across the North river, so as to include Nutten Island, Bedlow's Island, Bucking Island, and the Oyster Island, to low-water mark, on the west side of the North river, or so far as the limits of the province extend there, and so to run up along the west side of the said river or low-water mark, or along the limits of the province, until it comes directly opposite to the first mentioned river or creek, and thence to the place where the said boundaries first begun."—This charter also grants, that the mayor of the city, for the time being, "shall be *bailiff and conservator of the waters of the North and East rivers;*" and accordingly all arrests on these rivers were made by the mayor, as water bailiff, and the process for the purpose was directed to him.—Of late, and probably within twenty years, the practice has, by some means, gone into disuse, and, in place thereof, the process is directed to the sheriff, and served by him.—The three Oyster Islands and Shooter's Island are respectively, as relative to Manhattan Island and Staten-Island, beyond or westward of the channel.

There are records of more than one hundred and thirty grants, made at various times, by the successive governors of New-York, during the first thirty-five years from the conquest, to different persons, for lands on Staten-Island; some of them *original grants*, and others in the nature of *confirmations*, and the greater proportion of them subsequent to the release from the duke to the proprietors of East-Jersey, in 1682.

There was soon a controversy between New-York and New-

Jersey, concerning the northern boundary of the latter, or the points or stations, the western and eastern terminations of it, on the Delaware and Hudson respectively: when it began, cannot now, perhaps, as to any precise period, be ascertained; but, as early as the year 1700, the assembly of New York, in an address to the governor, lord Bellamont, mentions, "that differences have arisen between the county of Orange, in this province, and the province of East New-Jersey, and they therefore pray him to take into his consideration the settling the bounds between the two provinces." It was at last, in consequence of mutual acts by the respective legislatures, submitted to commissioners to be appointed by the crown.—"The appointment took place accordingly, and the commissioners, having assembled and heard the parties, they, on the 7th October, 1769, decreed, that the boundary or partition line between the colonies of New York and New Jersey should be a direct line from the fork or branch formed by the junction of the stream or waters called the Mahackamack with the river called the Delaware or Fishkill, in the latitude of forty-one degrees, twenty-one minutes, and thirty-seven seconds, as found by the surveyors appointed by the said commissioners, to a rock on the west side of Hudson's river, marked by the said surveyors, in the latitude of forty-one degrees, being seventy-nine chains and twenty-seven links to the southward, on a meridian from Sheyden's house, formerly Corbett's."—Both parties being dissatisfied with the decree, as it related to the point or station on the Delaware, appealed to the king in council, pursuant to a right reserved in the acts of submission; but in the course of two years thereafter they concluded to relinquish their appeals, and by like mutual acts to "adopt and confirm the line so decreed by the commissioners, and declaring, that it was and should be the boundary or partition line between the two colonies, and providing for the appointment of commissioners on the part of each to join in ascertaining and marking it so that it might be sufficiently known and distinguished, and the commissioners were directed and required to mark the before mentioned rock, on the west side of Hudson's river, with a straight line throughout its surface, passing through the place marked by the surveyors with the following words and figures, *to wit:* 'latitude 41 degrees north,' and on the south side thereof the words *New-Jersey*, and on the north side thereof the words *New-York*, and to mark every tree that might stand in the said line with five notches and a blaze on the north, west, and south-east sides thereof, and to put up stone monuments at one mile distance from each other, along the said line, and to number the said monuments with the number of miles the same should be from the before mentioned rock, on the west side of Hudson's river, and mark the words '*New-Jersey*' on the south side, and the words '*New-York*' on the north side of every of the said monuments."

On the 20th April, 1795, the common council of New-York passed the following ordinance or by-law and order:—

"It being represented to the board, that certain persons had set

up fuyck fences in the river, below low-water mark, on the south side of Paulus Hook, on the Jersey shore, to the obstruction of drawing seines for the taking of fish; whereupon the following ordinance was passed by the board:—

"A law to prevent the setting of fences or other obstructions in the rivers within the limits and jurisdiction of the city of New-York.

"Be it ordained by the mayor, aldermen, and commonalty of the city of New-York, in common council convened, and it is hereby ordained by the authority of the same, that no person shall set or place any fence or stake, or any other thing whatsoever, in any parts of the rivers or bays within the limits and jurisdiction of the said city, by which the navigation of the said rivers or bays, or the casting or drawing of seines or nets for the taking of fish, may be interrupted or obstructed; and if any person shall or do set or place any fence or stake, or any other thing whatsoever, in any part of the said rivers or bays, contrary to this law, such person shall, on conviction, forfeit and pay, as a fine for each offence, the sum of eight pounds.

"And further, that it shall be lawful for any person to take up and remove any such fence or stake, or other thing, which may at any time be found set or placed contrary to this law, as aforesaid.

"Ordered, that William Sloo, who is employed by this board to take fish for the use of the Alms-House and Bridewell, do cause to be taken up and removed all such fences or stakes, or other things, as may or shall be set in the river in the manner aforesaid, and which may or shall obstruct or interrupt him in casting or drawing his seine as aforesaid."

We have been informed, so as to be fully satisfied of the fact, that the fences and stakes were instantaneously removed by the persons by whom they were placed, and who, at the same time, disavowed any intention to obstruct the fishery.

We are, with due respect,
your obedient servants,

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, James Parker, Lewis Condict, and Alexander C. M'Whorter, esquires, commissioners, &c.

September 28, 1807.

No. II.

Observations upon the question, whether by the grant of the duke of York, of the 24th June, 1664, to Berkeley and Carteret, the right of the grantees was limited to high-water mark on the Hudson river, or extended to the centre of that river, usually termed the *filum aquæ*.—Charles the second, by his deed, dated the 12th March, 1663-4, granted to the duke of York the Hudson river in terms, by these words, "together, also, with the said river called Hudson's river."—The duke afterwards, by his deed of release, dated 24th June, 1664, granted to Berkeley and Carteret "all that tract of land adjacent to New-England, and lying and being to the westward of Long-Island and Manhattan's Island, and bounded on the east part by the main sea, and part by Hudson's river, and hath upon the west Delaware bay or river;" "and also all rivers, mines, minerals, woods, fishings, hawking, hunting, and fowling, and all other royalties, profits, commodities, and hereditaments whatsoever, to the said lands and premises belonging or in any wise appertaining, with their and every of their appurtenances, in as full and ample a manner as the same is granted to the said duke of York."—The idea, that the right of the duke's grantees is limited to high-water mark upon the Hudson, arises from considering the river as a public one, in which the tide ebbs and flows; and of course, at the time of the duke's grant, the soil and the water over it below high-water mark, at the common law, belonged to the king, and has not, at any time subsequent, passed out of him to any individual, and, of course, the state or public body that acquired the king's right became entitled to the whole of this river: or else, that the river passed to the duke by the king's grant, but did not pass by the duke's grant to Berkeley and Carteret, it not being granted to them in terms—and was carried, of course, by him to the crown, upon his acquiring it.—If the king had power to grant the river, it is presumed no person will doubt but that it passed by the grant to the duke. That he had such power at the common law, satisfactorily appears from Mr. Hargrave's Law Tracts, 1d, 17. The Hudson then ceased to be a royal river on the 12th March, 1764, and became the private property of a subject. By this transition, it is supposed it became subject to the law that regulates inland or private rivers, and lost the prerogatives which regulated the right to it when it was the property of the crown.

By the feudal law* all navigable rivers were computed among the regalia. From this source, and from certain political considerations, the same principle passed into the common law, and it being once established, that a navigable river belonged to the king, all his grants respecting such river were subject, of course, to the construction peculiar to royal grants. If, therefore, the king own-

* 1 Blackstone's Commentaries 274.—2 Ibid. 262.

ed the soil adjacent to a navigable river, and granted it to a subject, binding him upon the river, the grantee would be limited by high-water mark, the grant being construed most favorable to the king, and nothing by intendment being taken against him.—The owners of the soil adjacent to navigable rivers are therefore, *prima facie*, not owners of any part of the river; and if they claim title to the river, it must be strictly shewn by a grant from the king, in express terms or by prescription.—It is well known that the law* in respect to fresh rivers, or private rivers, as they are frequently termed, is directly otherwise, and that such rivers, of common right, belong to the owners of the soil adjacent; and that this ownership, *prima facie*, in all cases extends *usque filum aquæ*, which arises from the construction of the grant of the adjacent soil, binding the grantees upon the river—all such grants, by construction, carrying the right of the grantees to the *filum aquæ*.† This construction of law, so favorable to royal property, is one of the prerogatives of the crown, and never adheres to any description of property (except in some special cases of tenure by knight service) when such property ceases to be royal.‡ It follows then, conclusively, that if the soil adjacent to a navigable river, together with the river itself, become vested in a subject, and such subject make a grant of the adjacent soil, binding the grantee upon the river generally, without restriction, that such grant must receive the same construction as is incident to every grant of soil adjacent to a private river; otherwise that quality of the property which springs from prerogative only, would adhere to it after it passed into the hands of the subject, which, according to all the cases, can never be. The true doctrine, then, is, that, at the common law, when a navigable river becomes vested in a subject, it *ipso facto* becomes a private river, and all the law regulating the rights to private rivers necessarily attaches to it; subject, however, to the right of government, and to the *jus publicum*, hereafter spoken of.§ In the great case of the river Severn, the lord Barclay prescribed for the river, *usque filum aquæ*, as parcel of the manor of Barclay, and proved his prescription. Suppose he had granted the manor binding upon the river, in the usual form; it is presumed no one could doubt but the whole manor would have passed, on idea, that the section of the manor between high-water mark and the *filum aquæ* remained in the grantor, could only be entertained for a moment, upon the supposition, that the binding by the river in terms limited the grant to the margin: but when it be considered, that if the boundary be carried to the *filum aquæ*, the binding is equally by the river, the whole resolves into a question of construction, which, in the case of all private grants, being most unfavorable to the grantor, at once extinguishes the idea of the aforesaid section, of the manor remaining in him after such grant.

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* 4 Bur. 2164.—Hargrave's Law Tracts, 5.
† 1 Black. Com. 248-9.
‡ 17 Vin. Abr. 96.—1 Pur. Wm. 253.—5 Con. Rep. 56.—Prin. Law, 85.
§ Hargrave's Law Tracts, 85.

Every navigable river, thus made private by the grant of the king, like the river Severn, is still subject, as is said of that river, to two distinct rights.*—1st. The right of government over it, which the supreme power of the nation necessarily retains, in reference to the safety of the nation, and to the customs.—2d. The *jus publicum*, as it is termed by lord Hale, or the public interest, that the people have of passage and re-passage with their goods by water: for, as that great judge says, speaking of a navigable river granted to a subject, "the people must not be obstructed by nuisances, or impeached by exactions."—"For the *jus privatum* of the owner or proprietor is charged with, and subjected to that *jus publicum* which belongs to the king's subjects, as the soil of an highway is, which though, in point of property, it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified."

It may not be amiss to remark further, that if Judge Tucker's opinion, as expressed in his Blackstone,† be true, "that all prerogative rights in this country ceased at the revolution," it seems necessarily to follow, that the law applicable to the rights of private rivers, became common to public or navigable waters also,‡ and that peculiar right, by prerogative inherent in the crown, which occasioned the distinction in law in respect to these two kinds of rivers being extinguished, no distinction in the law, as to such description of waters, remained. It is presumed, therefore, at this day, that the rights of individuals, as relative to public and private rivers, are precisely the same; all, however, subject to the two description of rights before particularized, *viz.* the superintending right of the government, for the purposes of public safety and revenue, and the *jus publicum*.

This statement and consideration of the law accords with the practice and usage, and with the common understanding, it is believed, of the people of the United States.§ It was, no doubt, under this view of the subject, that the enlightened commentator of the laws of Connecticut, lays down the law to be—that "all rivers that are navigable, all navigable arms of the sea, and the ocean itself, on our coast, may, in a certain sense, be considered as common; for all citizens have a common right to their navigation, but all adjoining proprietors on navigable rivers and the ocean have a right to the soil covered with water, as far as they can occupy it, that is to the channel, and have the exclusive privilege of wharfing and erecting piers on the front of their lands. Any person, therefore, has a right to sail through the water that covers the land of another, without being liable for a trespass, in the same manner as one may pass through the air that is above the land of another, but no man has a right to do any act in the navigable waters in front of another's land which can affect the soil, as wharfing or erecting piers, for in this there is an exclusive property, though

* Harg. Law Tracts, 36.
‡ 2 Black. Com. 262.
† Page 237.
§ Swift 341.

there is not in the water; nor may adjoining proprietors erect wharves, bridges, or dams across navigable rivers, so as to obstruct their navigation."

It is presumed Mr. Swift meant to be understood, that such was the understanding of the common law in Connecticut, and it is believed that such is necessarily the understanding of the common law in every state in the Union since the revolution.

The result of the whole of this doctrine, then is, that, upon the strictest principles of the common law, the grant of the duke to Berkeley and Carteret, binding them on the east by the Hudson, carried their right of soil to the *filum aquæ* of that river: that no restriction in that grant was intended by the grantor, every one who reads it will readily admit. It conveys, in terms, all the land lying to the westward of Manhattan Island. If an adherence to express terms of grant is to be so much attended to, as is contended, a more plausible argument arises from considering the land under the Hudson as expressly included in these words, and carrying the right of Berkeley and Carteret to the eastern margin of the river, than limiting them to the western: and when it is observed that the grant contains "all rivers," it is presumed that, instead of any restriction of the property, that was the subject of the grant being intended. The intent was, that it should embrace all property that by the most liberal construction of the law could be brought within it; there being, then, no intent on the part of the grantor to limit the grant within the extent the construction of law would otherwise give it. If the statement of the law herein contained be correct, the conclusion on the question is inevitable,

That the grant to Berkeley and Carteret, at the time it was made, carried their boundary on the east to the *filum aquæ* of the Hudson river.

We are, gentlemen, respectfully yours,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Egbert Benson, Samuel Jones, Joseph C. Yates, commissioners.

September 29, 1807.

No. III.

Gentlemen,

Before a verbal conference, we beg leave further to submit for your consideration—

1st. Certain extracts and an affidavit, marked A, B, C, D, E.

2d. That a port has been established at Perth-Amboy ever since the settlement of New Jersey; and that the inhabitants of New-Jersey have been always in the constant practice of building wharves, erecting piers, establishing ferries, and taking fish and oysters in the waters adjoining, without any material interruption or question till of very late years.

3d. A clause in Smith's History of New-Jersey, describing Manhattan's Island as in Hudson's river.

4th. The duke of York's grant to Berkeley and Carteret, of New-Jersey, in June, 1664, binds the territory therein conveyed, "on the east, part by the main sea, and part by Hudson's river," and hath upon the west Delaware bay or river.

5th. Whether to take Staten-Island out of the duke's grant, it must not be shewn that it lies east of the main sea?

6th. Whether this can be shewn in any other way than by proving that the Sound, which separates it from the continent, and makes it an island, is the *main sea?*

7th. Whether the word *main*, as connected with *sea*, must not be presumed, in legal construction, to have been introduced into the grant for some purpose, and whether any purpose can be imagined but the obvious one of giving a definite meaning to the word *sea;* and to do away all uncertainty in the eastern boundary which might arise from confounding sounds, straits, or arms of the sea, with the sea itself?

8th. Whether the term *main sea* has not a precise legal signification, which corresponds with the vulgar or common signification of it, and synonymous with *ocean;* and whether this be not chief justice Hale's idea, in his description of it, when he says—"The part of the sea which lies not within the body of a country, is called the *main sea* or ocean."

9th. The duke, by his subsequent confirmatory grants of East New-Jersey, of 1680 and 1682, declares the eastern boundary to extend "eastward and northward along the sea coasts, and the said river, called Hudson's river," &c.—Whether the salt meadows, which chiefly constitute the western margin of the Sound, and which is thirty miles from the ocean, can be considered the sea coast which is called for by the grant; and more especially when the confirmatory grants add, "and all and every isle, islands," &c. could the duke, or any other person, conceive that the legal title to Staten-Island still remained in him?

10th. Whether the grants of the duke are to be circumscribed within the *littus*, there could have been any islands meant to be conveyed thereby?

11th. Whether the duke must not be presumed to have granted under legal advisement? And whether, according to the most approved rules of construction, his words ought not to be taken in the strongest and largest sense against him, so as not only to import as much as they do in common use, but also to include that signification which is known and received among lawyers? See Puffendorf, lib. v. ch. 12, sec. 13.—And whether the words *main sea*, under the above idea, do not mean more than the word *sea*, mentioned in the grant of Nicolls to the Elizabeth-Town people, as lying between Staten-Island and the main land?

12th. That the proprietors of East New-Jersey had great controversy with their first settlers, and on that account could have had no wish to have the weight of the crown thrown into the scale against them, by having a controversy with the royal governor respecting Staten-Island; especially with the arbitrary and tyrannical governor Andross, who shewed, at the same time, his power and his want of justice, by actually imprisoning governor Carteret, of New-Jersey, for the bare assertion of his lawful authority in parts of New-Jersey not in controversy.—The above is submitted as a reason why the proprietors of New-Jersey did not assert their jurisdiction over Staten-Island further than is referred to in the extracts submitted.

13th. That an Indian title has never been considered, *in New-Jersey*, any objection against one regularly deduced from the crown. Besides, the purchase of governor Lovelace from the Indians, for the duke, was in 1670, and anterior to his several grants of 1674, 1680, and 1682, by which all the rights he had at those times must have severally passed.

14th. That if a grant be restricted by actual length of chain or a natural landmark on the margin of a river, nothing can be presumed to have been conveyed further; and, as far as we have had opportunity to inspect the several grants and patents which have been shewn to us, they all appear to be capable of being reconciled on this principle, to the common law construction of deeds that we have heretofore submitted; except, perhaps, in the grants to some towns, which seem to be grants of jurisdiction, as to corporations, over lands which had been previously, or might be thereafter purchased by the settlers.

15th. That the commissioners who determined the northern boundary of New-Jersey, were excluded from settling the eastern boundary: hence it was that the commissioners marked the rock on the west side of Hudson's river with a straight line throughout the surface of the rock, passing *through* the place marked on the rock by the surveyors, with latitude 41 degrees north; and on the *south* side of the rock the words, New-Jersey; and on the north side with the words, New-York: and hence it is, also, that they did not mark the east side of the said rock with the words, New-York, if they had decided that to be the eastern boundary.

16th. Further observations on the construction of the several grants from the duke, independent of the common law construction heretofore submitted—which paper is marked No. 2.

We are, with due respect, your obedient servants,

AARON OGDEN,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT,
ALEXANDER C. M'WHORTER.

To EZRA L'HOMMEDIEU, SAMUEL JONES, EGBERT BENSON, JOSEPH C. YATES, esquires, commissioners, &c.

September 30, 1807.

No. IV.

GENTLEMEN,

In answer to your observations on the question, "Whether by the grant of the duke of York, of the 24th June, 1664, to Berkeley and Carteret, the right of the grantees was limited to high-water mark on the Hudson river, or extended to the centre of that river, usually termed the *filum aquæ*." It is requisite for us to attend to one principle, stated by you, in its application to the grant from the king to the duke, and the grants from the duke, namely: that at the common law, when "a navigable river becomes vested in a subject, it *ipso facto* becomes a private river, and all the law regulating the rights to private rivers, necessarily attaches to it."—Although, as will be perceived, we forbear from the examination of this principle, still to guard against presumptions from our silence, we think proper to declare, that we do not admit, because we do not discern, the law to be as we conceive you advance it; that when the soil adjacent to a navigable river on both sides of it, together with the river itself, becomes vested in a subject, and such subject makes a grant of a parcel of the adjacent soil, on one side of the river, bounding the grantees upon the river generally without restriction, that the right of the grantor to the river, comprehending the water, and the land covered with it, and the right of juri diction, (if he shall also happen to have such right) to extend between certain lines from where it is so bound to the river, on the channel, will pass to the grantee.

Supposing, however, that when the case was a *res integra*, or allowing a convenient time to Berkeley and Carteret, after the grant to them, to inform themselves of their rights, it might then have been made a question, as to the rules by which the grants of the duke were to be construed; we say, that these having been a cotemporaneous exposition, and a usage or practice in conformity with it, for a period little short of a century and a half, such question must now be precluded.

The grant from the king to the duke, besides passing an estate in the territory, further grants certain rights of jurisdiction or government, and which, as to be discriminated or ab-tracted from his estate or interest in the territory, comprehending the rivers within it, we shall denominate his right of *jurisdiction*; and although the duke, as between him and the king, was certainly to be considered as a subject; yet, in consequence of his *right of jurisdiction*, his grants were to receive the like construction as if they had been immediately from the sovereign, without the intervening grants to him; and in that sense, and in reference to that construction of his grants, he was, as between him and his grantees, to be considered as sovereign, and so the law has always been received in New-York; and accordingly every grantee has been declared to have sued out his grant at his peril; and as a consequence, if he deceived the duke in his suggestions for it, the grant was void. And further, the grants of the corporation of New-York, for the land between high and low-water mark, mentioned in the *statement* we have delivered to you; and the grants which are still constantly made by the commissioners of the land office, under the authority of the state, for the soil below high-water mark, where it had not, prior to the American revolution, been expressly granted, either by the duke, before or after his accession, or by his successors to the crown, after his abdication, all rest on the ground, that where the grant for the adjacent land was bounded generally by the river nothing passed below high-water mark: or, in fine, that the grants by the duke, as it regarded the rules by which they were to be construed, were to be deemed *royal grants*.

Whether the law of New Jersey has been held, that where the *proprietors*, prior to the mode, afterwards observed, of appropriating lands by warrants from *council* of proprietors to the surveyor-general, made a grant of land adjacent to a navigable river, so within the *fauces terræ* of the territory granted to them, as unquestionably to pass with it, and binding the land generally on the river; the grantee, as between him and the proprietors, was in virtue of the grant for the land, also entitled to the river as far as the channel, we are not informed: but supposing the law so to have been held, and consequently that, as stated by us, it is to be deemed the mere *lex loci* of New-York, and, as such, not affecting the rights of New-Jersey, still we trust you will be sensible, that it having now become, as it were, a fundamental in our state, it would be highly unadvisable in us to depart from it: not only so, but we have a perfectly satisfactory conviction, there was sufficient war-

rant, and founded in the law of England, as to be applied to the case or *colony state*, to assume and adopt it in the first instance, and that it has been wise to persist in it.

We remain, with due respect,
your most obedient servants,

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, Alexander C. M'Whorter, William S. Pennington, Lewis Condict, and James Parker, esquires, commissioners, &c.

September 30, 1807.

No. V.

Gentlemen,

We have hitherto considered this question in the light of a grant from one subject to another, of land lying in navigable waters.—Supposing we are wrong in the conclusion which we have drawn from this view of the subject, yet the real situation in which we stand, presents to the mind a different view of the question.

The duke of York received from his brother, Charles the second, a grant of a large tract of land in America, at that time little better than a wilderness, for the purpose of settlement and improvement, with ample powers of government. The duke, finding this territory too large for one colonial government, before the country was even taken possession of in his name, granted a large district of this country, of near two hundred miles extent, separated from the rest, on the eastern boundary, by large navigable waters, with like powers of government, to two of his friends, at that time high in the confidence of the king. This grant being made for the sole purpose of enabling the grantees to plant a colony, and improve the country; thereby to benefit, extend, and protect the empire. We apprehend that this grant, from the general principles of law arising therefrom, without any thing more, being the grant of an independent colony, carries with it a right to the use of the sea and navigable waters adjoining the same. Lest it should be said, that we take for granted what is yet to be proved, we will, in the first place, shew upon what ground we say, that the grant carried with it the powers of government. The state of New-York, we apprehend, will not deny that the powers of government were granted to, and vested in the duke of York, throughout the whole territory conveyed to him. In his grant to Carteret and Berkeley,

the territory is conveyed to them in as full and ample a manner as the same is granted to him: on taking possession of which, the grantees assumed the powers of government, under the immediate auspices of the duke and the crown; and, in sixteen hundred and eighty-two, after a partition had been made between East and West Jersey proprietors, the duke, in order to confirm the title of the East Jersey proprietors, made a new grant, in which he, in express terms, conveys an authority to the proprietors, "to exercise all necessary government there, with the same powers, authorities, jurisdiction, government, and other matters and things," which he himself derived from the grant to him. Should it be said, that a grant of the powers of government from the crown to a subject, is not alienable, yet we apprehend that the assent of the crown would cure that defect. That this assent was given, appears by a proclamation of Charles the second, dated the 13th day of June, sixteen hundred and seventy-four, wherein he says, that "Whereas our right trusty and well beloved councellor, sir George Carteret, by grant derived under us, is seized of the province of New-Jersey, in America, and of the jurisdiction thereof, as proprietor of the same, we do strictly charge and command all persons inhabiting in such province forthwith to yield obedience to the laws and government which are, or shall be there established by the said sir George Carteret."

A similar recognizance of the right of government, is contained in his majesty's letter to the deputy governor of New Jersey, dated the ninth day of December, sixteen hundred and seventy-two. This right of government, thus granted and confirmed by the duke, and recognized by the crown, was in fact exercised by the proprietors, upwards of thirty years, till it was voluntarily surrendered by them to, and accepted by the crown, in the beginning of the reign of queen Anne, on which it became a royal government, and remained a separate and distinct colony until the revolution, when it became an independent state; we therefore think that we are correct when we say, at least for the purpose for which we use it, that the right of government passed with the soil to the New-Jersey proprietors. That it could be the intention of the parties concerned, that so extensive a district of country should be separated from the remainder of the territory, erected into a distinct colony, with ample powers of government, the territorial lines of which, nine-tenths of its whole distance, binding on navigable waters, should be confined within its own shores, and so shut out from navigation, the free use of which being essentially requisite to its existence and prosperity, cannot, as we apprehend, be easily conceived of, nor for a moment gain credit with any impartial man, acquainted with the history and geography of the country. When, however, we look into the grants themselves, we find this right abundantly recognized, and in one of them in express terms provided for. In the original grant from the duke of York to Berkeley and Carteret, we find this strong and impressive language:—"And also all *rivers*, mines, minerals, woods, *fishing*, hawking, hunting, and fowl-

ing, and also all other *royalties*, profits, and commodities, and hereditaments whatsoever, to the said land and premises belonging or in any wise appertaining, with their and every of their appurtenances, in as full and ample a manner as the same was granted to the said duke of York."

Can it be said, with legal propriety, that the free use of all navigable waters washing the shores of an independent colony, is not appertaining to the territory, and among the regalia of the crown expressly granted? The settlement of New-Jersey was fostered and encouraged by the duke of York and the crown, for the extension, protection, and benefit of the empire. Can it reasonably be supposed, that it was intended to beguile the first settlers there, and then shut them out from the navigable waters adjoining their shores; that if they took an oyster in front of their lands, they were made liable to be dragged before the tribunal of a neighboring colony as trespassers? We think this circumstance, alone, sufficient to shew that it could not be the understanding of the parties at the time of the contract. But what puts this question beyond all doubt, is the words in the confirmatory grant by the duke of York to the East Jersey proprietors, in sixteen hundred and eighty-two, before mentioned; this being made to explain former grants, and confirm the title, hath the following additional clause:—"As also the free use of all bays, rivers, and waters leading into, or lying between the said premises, or any of them, in the said part of East Jersey, for navigation, free trade, fishing, or otherwise." Here is a complete recognition of the right of the New-Jersey proprietors to the free use of the waters leading into any part of the colony, for fishing, trade, &c. In consequence of this grant, thus made and explained, the lords proprietors, grantees under the duke, acting under his auspices, protected, countenanced, and encouraged by the crown, held out to the adventurers into the colony, in a set of articles of agreement made with them, in the nature of an original constitution of colonial government, called the grants and concessions of the lords proprietors, and dated sixteen hundred and sixty-four, among other things, "that the assembly should have power to create and appoint such and so many ports, harbors, creeks, and other places, for the convenient loading and unloading of goods and merchandise, ships, boats, and other vessels, as shall be expedient, with such jurisdiction, privileges, and franchises, to such ports, &c., belonging, as they shall judge most conducive to the general good of the said plantation or province." It was also agreed "that the inhabitants of the said province have free passage through or by any seas, bounds, creeks, rivers, or rivulets, &c., in the said province, through or by which they must necessarily pass, to come from the main ocean *to any part of the said province;*" and to induce adventurers, the lords proprietors published, in England, an account of the situation of the colony, shewing its advantages; and among other things say, "that for navigation, it hath these advantages, not only being situated along the *navigable parts of the Hudson river*, but lies fifty miles on the main sea," &c.; and again,

"it being considerably peopled and situate on the coasts, with convenient harbors, proper for such as incline to fishery, the whole coast and every harbor's mouth being fit for it."

We are aware that the acts of the lords proprietors, and the encouragement held out by them to the first settlers, are not legally binding on any others than themselves and representatives; but we apprehend that all this being done under the eye of the duke, and within the hearing of the king, by the friends and favorites of each, is strong evidence of the understanding of the parties at the time of the contract; and we apprehend that cotemporaneous expositions are weighty in law. On this head we will further observe, that at the time that the proproprietors were about to surrender to the crown, in the reign of king William, they stipulated, among other things, that they should be entitled to wrecks and royal fish that should be forfeited, found, or taken within East Jersey, or by the inhabitants thereof within the seas adjacent, to remain to the proprietors, with all other privileges and advantages, as amply as in the grant and confirmation to them, of the fourteenth of March, sixteen hundred and eighty-two, (that is, the confirmatory grant of the duke of York, before mentioned) to which the lords commissioners of trade and plantations made answer, "that the right accruing to the proprietors from the seas adjacent cannot be well circumscribed; and that the grant of sixteen hundred and eighty-two, ought to be well considered, and such particulars therein as are proper, may be allowed of;" that is, as we apprehend, such things as did not concern the rights of government, which were about to be surrendered. All this added to the reasonableness and propriety of the thing, must, we think, force irresistibly on the mind a conviction, that the king, the duke of York, and all parties concerned in the transaction, understood that the inhabitants of New Jersey, as a separate independent colony, was to have the free use of the Hudson river and all navigable waters washing their shores, with convenient access to the sea, comprehending in which, the right of erecting and establishing docks, wharves, piers, and ports, any where on or adjacent to their own shores. When we speak of a separate independent colony, we would be understood to mean, separate and independent of any other colony, but not of the crown. This, therefore, being the intention of the grant, the nature of the transaction, and understanding of all parties concerned in interest, and, as we apprehend, according to the general principles of law arising on the subject, the practice hath been correspondent thereto ever since.

For, we think, we may with perfect correctness state, that as far back as the memory of man extends, or any other evidence can be adduced, to the present hour, the inhabitants of New-Jersey have used, and uninterruptedly exercised the right of erecting and establishing docks, wharves, piers, ferries, and fishing weirs, in front of their lands adjoining Hudson river and all other navigable waters, and have uninterruptedly used the waters of the Hudson river, and the sea adjoining and contiguous to their shores,

for the purposes of navigation, trade, fishing, &c., in the same manner as any other American colony did use, occupy, and enjoy their own shores, and the navigable waters adjoining and contiguous to them. Independent of any grant, act, stipulation or agreement, we are, from the nature of the transaction, led to consider, that, in settling and colonizing the wilderness of America, every district of country erected into a separate and distinct colony, with the powers of government, either royal or proprietary, became entitled to the use of the navigable waters by which they are bounded, as part of the territory and domains of the colony, subject, however, to the general jurisdiction of the crown, made for the purposes of trade, revenue, and defence: that the several colonies, in respect to each other, were wholly independent, and placed, in respect to their relative rights, in the situation of independent territories. Being, then, in possession of these rights, as we apprehend, by express grant, by the understanding of all parties concerned at the time of the grant, and the general principles of law in respect to the same, and having ever since actually exercised and uninterruptedly enjoyed them, we are at a loss to conjecture on what ground or foundation the state of New-York could build up a claim adverse to them. We apprehended that there existed some grant with a date anterior to the settlement of the country, and transcending all our rights; but, on the most diligent inquiry, we have not been able to discover a syllable, in writing or print, on the subject, unless the charter of governor Montgomery, in 1730, sixty-six years after the settlement of the country, and the vesting of our rights, can be considered as such. The charter of governor Dungan to the city of New-York, in 1688, and in the reign of James the second, who was formerly duke of York and proprietor of the province, expressly limits the jurisdiction of the city corporation to low-water mark on their own shore; and thus circumscribed, it remained until the year 1730, in the reign of George the second, when governor Montgomery, desirous of encouraging the commercial city of New-York, by endowing it with large extensive territory and jurisdiction, renewed the ancient charters, and extended the jurisdiction of the city corporation, in the first place to Long-Island, and from thence across the river, taking in the small islands in the same, when, with cautious circumspection, he approaches the Jersey shore, in the language following:—"To low-water mark on the west side of the North river, or so far as the limits of our said province extend there, and so to run up along the west side of said river, at low-water mark, or along the limits of our said province, until," &c.

Whether it is intended to set up this charter of Montgomery as an evidence of the line of the province of New-York extending to the Jersey shore, we know not; we think that it evidences the contrary—for, if the line of the colony at that time extended to low-water mark on the Jersey shore, governor Montgomery would never have set it afloat by the equivocal language made use of in his charter. The utmost that can be said of this charter is, that it

extends the jurisdiction of the corporation of the city of New-York as far as the limits of the colony west. The province of New-York was not enlarged by this charter, nor is it any evidence of the colonial line;—it says no more than this, if the line of the province extend to low-water mark on the Jersey shore, then, and in that case, the jurisdiction of the corporation shall extend there also; and if not, then to the line, wherever it may be. If, instead of low-water mark, it had said, to Arthur Kull bay and Hackensack river, it would have been precisely the same thing; the question, where is the line of the province, would have been wholly untouched and undetermined by it. The charter of Montgomery, we think, proves conclusively, that in 1730, sixty-six years after the grant of the duke and the settlement of New-Jersey, that there had been no grant, deed, charter, or other instrument of writing, made to the province of New-York, designating the low-water mark on the western shore of Hudson river as the western line of the province. We understand that the state of New York entertains an idea that the colonial government of New-York was placed in the shoes of the duke of York, and became his representative when this notion took its rise, or on what evidence its legal existence is grounded, is wholly inconceivable to us.

In an opinion delivered by Mr. Richard Harrison, at the request of the corporation of the city of New-York, in May, 1804, Mr. Harrison says, "that it is well known that so much of the land between Connecticut river and Delaware bay as passed by the grant of the duke of York, and was not conveyed to the proprietors of New Jersey, reverted to the crown upon the accession of James the second." The colony of New York must, then, not only have been the representative of the duke, but also of the crown. We look upon all this as imaginary;—but supposing it was real, and we were contending with the representatives of the duke of York and the crown, the representatives must surely be bound by the acts of their principals. In the grants of the duke, afterwards confirmed and explained by the crown, the facts are simple, and capable of being drawn in a small compass. The right of soil and government being in the duke of York, he formed a tract of land, lying westward of Long-Island and Manhattan's Island, into a colony, and another tract of land, lying on the east of the Hudson river, and including a northern district of country, into another colony; the two colonies to build docks, wharves, piers, erect ferries, fishing weirs, on or contiguous to each of their own shores, at pleasure, and occupy and enjoy the river in common. The only difference between the two colonies, in this respect, is, that New-Jersey has a written authority for what they do, and New-York has none; that New-Jersey should be placed in a worse situation with a written, than New-York without a written title, is to us a matter of surprise.

We should think that a claim so derogatory to the rights of an independent state, and humiliating to the feelings of a free people, should have for its basis a more solid foundation than any thing

which has yet appeared to us. We can perceive nothing, either in the original formation or progress of the colonial governments, that should give one colony a superiority over the other, in respect to their respective shores, and the use of the navigable waters adjoining the same, or to the jurisdiction over them. If the colony of New York derived any advantages from being a royal government, which is a matter we cannot easily conceive of, yet the colony of New-Jersey, in the commencement of the last century, became a royal government also, and continued so until the revolution, and in that respect was on equal ground with the colony of New-York.

We are, with due respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To EZRA L'HOMMEDIEU, SAMUEL JONES, EGBERT BENSON, JOSEPH C. YATES, esquires, commissioners, &c.

September 30, 1807.

No. VI.

GENTLEMEN,

We yesterday delivered to you a written answer to your observations on the question relative to the construction of the grant from the duke of York to lord Berkeley and sir George Carteret, and you also delivered to us a number of papers, which we have perused and considered, and thereupon find ourselves under the necessity of making a further statement in writing, previous to the intended verbal conferences between us.

We have already stated, in effect, that we conceive the subject of the present reference to be a question of boundary, and resolving itself into three questions.

Whether New-Jersey is to be restricted to high-water mark? Or whether she is to extend to low-water mark? Or whether she is to extend to the channel? All depending on the above grant, construed as if it had been *immediately* from the *king*: hence it will be perceived that we do not consider the right of New-Jersey to *use* the waters in question, separated from her claim to boundary or jurisdiction, as in controversy; on the contrary, we do not sup-

pose ourselves authorized, much less held, to contend for a right in New-York to appropriate the *use* of those waters to her own inhabitants, or, as it is usually expressed, *citizens*, to the exclusion, or in any manner to the prejudice of the citizens of any other state.

In answer to the suggestion, that by the grant the right of government, or, as we have expressed it, the *right of jurisdiction* passed, with the soil, to the New-Jersey *proprietors*, and the difference thereby occasioned, as to the presumed interest of the parties, or, in other words, as to the construction of the grant, we would state, that the grant is wholly incompetent, in terms, to create or convey a *right of jurisdiction*. It contains no *words of grant* more operative than are to be found in every other grant from the duke, and to refer particularly to the grants for the township of Harlaem, on Manhattan Island, and the township of Brooklyn, on Long-Island, the former being bounded, for at least ten miles, on the Hudson, Spit Den Duyvel, Harlaem, and East rivers, and the latter, for at least three miles, on the last river; and yet, as to both the land between high and low-water mark, was afterwards granted to the corporation of New York:—as usual, it contains many words altogether inoperative, and such as that a perfect estate in the soil or territory, comprehending the rivers within it, would have passed without them, and certainly none of sufficient *legal* import to pass a right of *jurisdiction*. But admitting the grant competent, in terms, to pass an independent *right of jurisdiction*, another question still remains: was it competent for him to pass it as to a *parcel* of the territory? He doubtless might *alien* the territory granted to him in *parcels* to others; but it will not thence follow, that, as to the *right of jurisdiction* granted to him, there was not always to be *unity*, if we may so express ourselves, even should it at times happen to be vested in a plurality of *natural* persons not unanalogous in this respect, as if it had been granted to a *corporation*, so that neither he nor his heirs or assigns could pass all *independent or distinct right of jurisdiction* to another, over any particular *parcel*, and the *general right of jurisdiction* originally over the *whole* territory, thenceforth, as to such *parcel*, to cease, and for this obvious reason, that if a distinct right of *jurisdiction* could be passed as to *one* parcel, it might as to *more*, and there being nothing in the original grant from the king to limit the *number*, and the territory or *space* granted by it being infinitely divisible, the several and distinct jurisdictions or governments, or sovereignties, however they may be most aptly termed, might be numberless; but further, there not being any thing in the original grant restraining a grantee, to whom a *right of jurisdiction* over a *parcel* of the territory had passed, to pass to his alience of a parcel of such parcels, and such second alience again on an alienation of a parcel of the parcels aliened to him; also to pass a *right of jurisdiction* to his alience, and so on, whatever may be the number of the several successive alienations of the respective *lesser* parcels, *ad infinitum*, so that one alienation of the *right of jurisdiction*, as

to a *parcel*, would defeat the grant altogether, as to the *right of jurisdiction* intended to be created and granted by it. The partition between the proprietors, it is true, assumes it that the *right of jurisdiction*, equally with the territory, was partible, the government over each moiety becoming thereby *distinct* and *independent* of the government over the other moiety, and the grant or *further assurance* from the duke to sir George Carteret, the grandson, of the 10th September, 1680, and under which it would seem his executrix, the year thereafter, set up a claim to Staten-Island, also assumes it, that in the partition the proprietors had ceased to *hold together*, as well the *right of jurisdiction* as the territory or *land*, and the duke accordingly grants to sir George Carteret, the grandson, and in full and in express terms the *right of jurisdiction* over his purpart, what was agreed between the parties to the partition, should thereafter be called *East New-Jersey*. We are, however, willing to waive all these questions, and are ready to admit, that as soon as the conquest of the country from the Dutch came to the knowledge of the *proprietors*, they actually established and exercised a government over the territory granted to them, and, as under a right or power contained in the grant from the duke, that the government, so established and exercised by them, was recognized by the inhabitants and the government of New-York, by the duke, and by the king; and so far it was a government *de jure*, or legitimate, but that in another, and equally just sense, it was a government *de facto*, only as founded in mere *practice* under the grant; and inasmuch as such *recognition* was of a government certainly not including the Oyster Islands and Shooter's Island, and there being no matter, either of *fact* or of *law*, by which a boundary could be assigned to it, intermediate between those islands and the western shore, the recognition was *virtually* of government, whose eastern boundary or limit was high water mark.

With respect to the general fact, that New-York has always exercised over the waters between the shores of the two states, and the fact, that the mouth of the river Hudson was at or near Bedlow's Island, as far as they may be supposed to be in the knowledge of any persons now in life, are so within the knowledge of two of us, as that, in course of the discussion, we shall assume them as proved; namely, that, from their earliest recollection, there has always been a reputation or understanding, that the whole of the waters of the river Hudson, and of the bay between Staten-Island and Long Island, were within the actual jurisdiction of New-York; that there was not, however, any precise reputation or understanding either way, whether such jurisdiction extended to high-water mark, or was confined to low-water mark on the shore of New-Jersey; that, as to the waters between Staten-Island and the main, there was no reputation or understanding as to a boundary or line of jurisdiction; that the citizens of New-York and New-Jersey had a free and common use equally of the waters in question, to take fish within the same, and for every other pur-

pose; and that, according to the common conception, when a vessel was below Bedlow's Island, she was said to be in the *bay*, and when above it, in the *North river*.

We remain, with due respect,
your obedient servants,

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, Alexander C. M'Whorter, William S. Pennington, Lewis Condict, and James Parker, esquires, commissioners, &c.

October 1, 1807.

No. VII.

Gentlemen,

Permit us further to submit—

I. Whether it must not be intended that the duke considered the Hudson's river ending at the point where the main sea commenced, or otherwise, can it be intended that he meant to leave a chasm in the line of the eastern boundary of New-Jersey.

II. Whether the duke intended the Kill of Kull as part of the main sea, under the following considerations:—

1st. That the word *Kill* means *river*, and cannot therefore be considered as part of the *main sea*.

2d. The Hudson's river does not empty itself into the Kill of Kull.

3d. The course of the Kill is east and west, and not north and south, and consequently would form a southern, and not an eastern boundary.

4th. That the waters of Raritan bay, extending westward from Sandy-Hook, would form a northern, and not an eastern boundary.

III. Whether the common law construction of grants that we have submitted, will not be sufficiently reconciled with the rule of construction, as understood in New-York, in original grants there by a recollection that the duke came to the crown in 1684, *after which* all such grants might be considered as royal grants; and

whether, by this consideration, we may not avoid the dilemma of putting aside the *lex loci* of New-York or the common law of the realm, as understood when the grants of the duke were made.

We remain, with respect, your obedient servants,

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, and Joseph C. Yates, esquires, commissioners, &c.

October 5, 1807.

No. VIII.

Gentlemen,

In answer to the two first questions you submitted to us yesterday, we say, that as the grant from the duke expresses the southern boundary by the main *ocean*, and the eastern by the main *sea*, it is to be presumed that the terms, though they frequently have the same, yet, as used in the grant, were intended to have different significations, and which accords with the fact, the bay between Sandy-Hook and the Narrows may be denominated *sea*, but to denominate it *ocean* would be a forcible mode of expression which the occasion only might perhaps tolerate. The water between New-Jersey and the western shore of Staten-Island is certainly neither *river* nor *creek*, in the strict and most correct use of the terms, but is, what its present name properly imports, a *sound*, which is an *arm* of the *sea*, being a *passage*, and in that sense may be considered as *sea*, and it appears that the instant the question occurred, whether the appellation of *river* or *sea* was to be applied to it? the latter was preferred as the more proper, and the error in the previous Indian deed corrected in the subsequent formal grant by the government accordingly. Kill van Kull, considered as a *continuation of the passage* by the sound to the bay, may also be denominated *sea*, and at the same time, when considered as the passage between the bay and the *Achter* Kul, or *Back* Kul, or bay now Newark bay, it may be also denominated the Kill, and so the *Kill of the Kull*. The Dutch word *Kill* has been used in this country without any precise or definite meaning, as will be perceived when it is mentioned, that the Mohawk river was called the Maquaar *Kill*, the passage between the Hudson and Harlaem rivers, round the northern point of Manhattan Island was called Spit Den Duyvel *Kill*, and New-Town creek, an arm of the East river, dividing the counties of King's and Queen's, on Long-Island, for some miles, and no stream issuing into it, or passage from it, was called

Mispat *Kill*, so that the sense in which it is to be understood must always be according to the *subject matter*.

It will, however, be perceived that Kill van Kull is wholly without the question; for if the boundary is to pass through the *Sound*, and not through the *Narrows*, then it, of course, must pass down through Kill van Kull to reach the mouth of the Hudson, and if the line is to pass through the *Narrows*, then Kill van Kull, and it can have no possible relation to each other: so that either way the inquiry, whether Kill van Kull is to be declared an arm of the *sea*, or a *river*, or a *creek*, is useless.

That the mouth of the Hudson is at its confluence with the East river, we might merely refer to *Van Der Donck*, and to the statement we have delivered, that such has been the common conception in regard to it hitherto; but, in addition thereto, we conceive ourselves warranted in asserting, that so it exists in nature, though we at the same time admit, that for legal or artificial purposes, and such as right and justice would require, the river itself might, constructively, be considered as commencing not only at the Narrows, but even at Sandy-Hook, the entrance into it from the ocean. As to the objection, that the course of Kill van Kull is east and west, and that the waters of Raritan bay extend west from Sandy-Hook, so that the Kill would form a southern, and the bay a northern boundary, we answer, that supposing the ocean to be the southern boundary, then a line from Sandy-Hook along the shore of Raritan bay through the Sound and Kill van Kull, and up the Hudson to the degree of latitude, we conceive may, with propriety, be denominated the *eastern* boundary, notwithstanding the deviations of some of the curvatures or courses and distances in it, from its general northerly and southerly direction.

In answer to the third question, we would mention, that we do not know, neither have we any reason to believe the distinction you surmise between the grants of the duke before, and those by him after he came to the crown, has ever obtained: referring, therefore, again to the subsequent special grants which have been and still continue to be made for the soil below *high-water mark*, as proof or example, we will only further state, they have all taken place without discrimination, as it respects the prince or person from whom the grants for the adjacent upland were obtained, and proceeded on one uniform simple assumed principle, that the grants for the upland are within the *prerogative* rule of construction.

We are, with due respect, gentlemen, yours, &c.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, Alexander C. M'Whorter, James Parker, and Lewis Condict, esquires, commissioners, &c.

October 2, 1807.

No. IX.

Gentlemen,

Upon reading your first note, handed us this day, it has occurred to us as proper to submit to you the following considerations :—

1st. Whether the general question of boundary between the two states does not involve in it the consideration, whether the high-water mark or the *littus* on the eastern side of the Hudson river, be the true and legal line of division, equally with the lines of division stated by you.

As you will recollect, in our first communication we urge, that the duke, having granted to us all the land lying and being to the westward of Long-Island and Manhattan's Island, gave us ground to contend, that the true intent of the grant was to invest us with the soil or land under the water of that river, and the grant conveying also *all rivers*, fortifies the idea. And although it may be said, that the subsequent part of the grant binds us by the river, it is still to be recollected, that if the soil under the water passed by a just construction of the deed, no subsequent words in the same deed could defeat this right.

2d. We are by no means satisfied with the opinion entertained in New-York, that the grants of the duke of York are to be considered as acts of the king, or, in other words, royal grants.

3d. We wish not to be understood, that we are contending for the use of the waters lying between the two states merely as a common highway, which every alien friend would possess equally with us; but that we consider them, at least to the *filum aquæ*, as within our jurisdiction, and the land lying under them as part of the territory and domains of the state.

4th. We apprehend it must have escaped your notice, that the powers of government are conveyed to the East Jersey proprietors in the confirmatory grant of 1682, in direct and unequivocal terms, as fully as they are granted to the duke, for which we refer you to an extract of that grant, accompanying this paper, and marked No. 1.

5th. As to the competency of the duke to grant an independent right of jurisdiction, we apprehend that the proclamation of Charles the second, bearing date the 13th June, 1674, and also his letter of the 23d November, 1683, must have escaped your notice, in which this right is not merely implied, but expressly recognized, extracts from which we herewith deliver you, marked Nos. 2 and 3. It may be a question, whether, at the common law, the power of creating an independent government could be conveyed even from the king to a subject, much less from one subject, in divided parts, to other subjects; yet it was done, and subsequently acquiesced in by all parties concerned in interest, *viz.* the duke and the king; and New-Jersey therefore became an independent colony *de jure*, as you candidly admit a recognition by the inhabitants and government of New-York, was in no wise necessary to make the

right legitimate. It was not in this point of view alone that we mentioned the grant of the powers of government, but to shew that it was the intention of the duke, at the time of the grant, to erect all the territory lying westward of Long-Island and Manhattan's Island to the forty-first degree of north latitude into a colony, with the accustomed powers of government, and that therefore the grant was entitled to a different construction and consideration as to the navigable waters adjoining the territories contained in it, than if it had been a grant of a small tract of land unaccompanied with such intentions.

6th. We do not admit it to be a fact, as advanced, that New-York has ever exercised the exclusive jurisdiction of Hudson river, nor do we think that reputation or common understanding will be sufficient authority to assume that fact. We think we are correct when we say, that the reputation and common understanding of New-Jersey was contrary and repugnant to the reputation and common understanding in this respect in New-York. Besides West-Chester county, we understand was, previous to the revolution, (and we presume is so still) actually bounded on Hudson river, and, as we apprehend, could not, in any view of the subject, have jurisdiction beyond the *filum aquæ*.

It may be true, that New-Jersey, while a colony, and since it has become an independent state, has had but little cause to exercise jurisdiction on Hudson river; but we apprehend that the *quantum* or degree of the exercise of a right does not affect the right itself. Whenever New-Jersey hath had cause to exercise jurisdiction over the wharves, docks, ferries, fishing weirs, &c., beyond low-water mark on Hudson river, it hath done it. And it is a fact of public notoriety, that a man has been indicted and tried for murder committed on Hudson's river, as within the body of the county of Bergen.

We are, with respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
LEWIS CONDICT,
JAMES PARKER.

To Ezra L'Hommedieu, Egbert Benson, Samuel Jones, Joseph C. Yates, esquires, commissioners, &c.

October 2, 1807.

No. X.

GENTLEMEN,

If the commissioners on the part of New-York and New-Jersey should unfortunately disagree upon the construction of the several grants of the duke of York, still it is hoped that the following considerations, which are wholly distinct from those heretofore submitted, may prove sufficient to produce an agreement in another particular, to wit:—

That the jurisdiction of New-Jersey must be co-extensive with its *natural* territories, as understood by the laws of nature and nations.

The following may serve to illustrate and prove the foregoing propositions.

I. That New-Jersey possessed all the rights of a free, sovereign, and independent state, as fully and completely as any nation on the globe, except so far as she may have delegated rights to the general government of the United States: that, in virtue of her sovereignty or empire, (unless some limitation be shewn) she has jurisdiction over all the territories which by natural law belongs to it, and a perfect right to all powers within such territories that are necessary for her safety and preservation.*

II. That where two nations border each on a navigable river that (unless some reason of preference can be shewn) the jurisdiction of each extends to the middle of the river.†

III. That the coast of the sea, the shores, the bays, and harbors belong to the jurisdiction of the adjoining country; they are, as it were, the gates and inlets to such country, and necessary for its safety and commerce,‡ and, consequently, a part of the country and manifestly within its territories, and under the empire§ of the government established therein.

IV. That the empire of a country and the property in its soil are not inseparable in their nature, even in regard to sovereign states; and nothing prevents the possibility of property belonging to a nation in places not under its obedience, in which case they possess them in manner of individuals.¶

V. That if the foregoing positions be true, it will *not* follow that the jurisdiction of our shores and harbors belong to the state of New-York, although the property should belong to any individual or corporation within that state, or even to that state itself.**

VI. That the king of Great-Britain possessed, not only the *property* in all navigable rivers, but by his prerogative, claimed and exercised (among his regalia††) jurisdiction over them, and over all shores below high water mark, and over all ports and harbors whatsoever within his American colonies. It is therefore evident that if the grant to the first settlers of New-Jersey had contained

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* Vattel 6. † Ibid. 108. ‡ 1 Black. Com. 264. § Vattel 116. Puff. 383, lib. iv. c. 4 & 5. Vattel 118. ¶ Ibid. 253. ** Ibid. 118-258. †† 1 Black. Com. 164.

an express limitation to high-water mark, it would only follow that the property, as well as the jurisdiction over the subject matter now in controversy was retained by the duke, and again resulted to the crown when he became king of England, and would be no more than if the crown had retained originally the property and jurisdiction of a large lake in the centre of New-Jersey.

VII. It is believed that the crown of Great-Britain, by the lords commissioners for trade and plantations, exercised the actual jurisdiction in and over all harbors and rivers within her colonies, independent of any colonial assemblies; in which case, when the independence of New-Jersey was acknowledged, the king of Great-Britain impliedly yielded to her all the jurisdiction generally, which he had before exercised in, over, and within the natural territories belonging to the *country* called *New-Jersey*.

VIII. That New-Jersey having, as before mentioned, on her various sides many valuable bays, harbors, and ports, naturally forming a part of her territory, and essentially necessary for her safety and the establishment of her commerce, we do not perceive how any principle can be admitted which may abridge her sovereignty over her shores and the adjoining waters.

We remain yours, with due respect,

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, and Joseph C. Yates, esquires, commissioners, &c.

October 2, 1807.

No. XI.

Gentlemen,

A recurrence to the grants from the duke does not enable us to find where he expresses the southern boundary to be the *main sea*. In his release of 1664 to Berkeley and Carteret, his description of the boundaries of New-Jersey is as follows, *viz.* "Bounded on the east *part by the main sea and part by Hudson's river*, and hath upon the west Delaware bay or river, and extendeth southward to the main ocean as far as Cape-May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river Delaware, which is in forty-one degrees of latitude, and crosseth over thence in a straight line to Hudson's river, in forty-one degrees of latitude." In this deed of confirmation to the twenty-four proprietors of East New-Jersey, of the 14th March, 1682, is the following description:—"All those easterly parts or

shares and portions of the said whole and entire tract of land and premises before mentioned, extending *eastward* and *northward* along the sea coasts and the said river called Hudson's river, from the east side of a certain place or harbor lying on the southerly part of the same tract of land, and commonly called or known in a map of the said tract of land by the name of Little Egg-Harbor, to that part of the said river called Hudson," &c.

Besides, the map of New-Jersey manifestly shews the ocean to be the longest part of its eastern boundary line, and that the course of the *sea coast* is almost north and south from Little Egg Hrrbor, and is as directly so as the Hudson's river itself.

Whence it seems to be manifest, that the duke of York did not intend to use the term *main sea* in a different sense from the synonymous term *ocean;* but, according to the real fact of the case, that is to say, the ocean lying on the eastern boundary, agreeably to the common and legal acceptation of the term *main sea.*

That we are ready to admit, that the Raritan bay, the Sound, and the Kill of Kull may be well denominated *arms of the sea,* which may be said to extend from the *fauces terra* as far as the tide ebbs and flows. But we do not perceive any necessity to depart from the express terms of the grant, and leave a *direct northerly course* through the *Narrows,* which is equally an *arm* of the sea, in order to deviate to a westward course from Sandy Hook, round Staten-Island; which, instead of affecting any manifest intention of the duke, seems directly contrary to it, if any meaning is to be collected from the description of the course as being *north,* and the situation of the land as lying westward of Manhattan Island and Long-Island, and not as lying westward of Manhattan Island and Staten-Island, which otherwise would have been his mode of expression.

We cannot yet perceive why the common law construction of the duke's grant, which is manifestly according to his real interest, should, in a discussion like the present, be given up, in order to let in a narrow prerogative construction, which is defined to be "*law in case of a king, which is not law in case of a subject;*" which construction, if carried to the extent under the arguments which have been delivered to us, ousts New-Jersey from all jurisdiction on her shores lying adjacent to Delaware river, Delaware bay, the main sea, the Raritan bay, the Sound, and the Kills, and from thence to the forty-first degree of latitude on the Hudson river.

We are, gentlemen, yours, &c.

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, Joseph C. Yates, esquires, commissioners, &c.

October 3, 1807.

No. XII.

GENTLEMEN,

We have attended to the *propositions* contained in one, and to the *questions* contained in the other of your communications of the 2d instant.

The propositions, when considered as in the *abstract*, and with some explanations or modifications, and which we are persuaded you would admit as requisite to render them more definite, probably would not be disputed by us; but we do not perceive how they or the authorities you cite can serve as a rule of the law whereby to decide the question between the two states, which is a question of *right* or *title* to *territory*, comprehending not only land but also of water and the land covered with it, and of right or title both to the *jurisdiction* and the *property*, and arising on a grant or transfer of jurisdiction and property made as under the law of the *land*; the *same* law by which a former question of boundary, arising on the *same* grant, and between the *same* parties, was decided. We cannot, therefore, consent to resort to the law of nature and of nations, as a rule of decision. But the case would, from necessity, be remanded to its proper *forum*, for the law of nature and of nations, being, as you have stated it, "that when two nations border each on a navigable river, unless some reason of preference can be shewn, the jurisdiction of each extends to the middle of that river."

The *reason of preference*, alleged by New-York, is a better right or title by positive law. But, if we were to consent to leave the question to be decided according to the law of nature and nations, and assuming the fact, that New-York and New-Jersey began to exist as distinct independent governments or sovereignties at the same instant, and that coeval therewith, and for the period we have stated, New-York has uninterruptedly, and without any claim by New-Jersey, actually exercised or *possessed* the jurisdiction over the waters in question, surely the law of nature or nations would pronounce that such *possession* or prescription is, of itself, decisive against New-Jersey, and that the peace of civilized nations require that New-York should be declared to be at peace as to that portion of her territory.—And here we take occasion to repeat, that the *fact*, as to the *possession* of the jurisdiction, is so in our own knowledge, that it would not be possible for us to surrender a belief of it, no more than it would be (if we may be tolerated in the expression) to surrender a belief arising from the evidence of our own senses, whoever might be the witnesses, and whatever the number of them, testifying differently; and especially if they were weak and immediately interested, and although upright, yet, perhaps, not sufficiently guarded or capable to distinguish between their wishes and their thoughts.

The individual act of Mr. Kennedy, in 1746, in purchasing a proprietary right, and having Bedlow's Island, which he then held under a New-York title, surveyed on it, is certainly not only no

proof of an interruption of the *possession* of New-York, but we suspect the transaction may be explained when it is recollected, that he was, at the time, owner of the farm at Ahasimus, bordering on the river, and it was not unnatural for him to reason, as it appears the proprietors of New-Jersey did, on the application of Palmer, for their title to cover his estate on Staten-Island: and "that it would be of no ill consequence, but rather of service, to any claim" which he might thereafter be minded to make to the water, or the soil under it, in front of his farm.

The fact you state as of "*public notoriety*, that a man had been indicted for a murder committed on Hudson river, as within the body of the county of Bergen," has never before come to our knowledge. On inquiring, we find, that the question, whether the *place* was within the jurisdiction of New-Jersey? was raised, and was expressly reserved; that the trial proceeded, and the prisoner was acquitted, the proof not being sufficient; that it was so *recent* as within two years last, and the proceedings wholly unauthorized, even by the law of New-Jersey, for supposing the state to have the jurisdiction below high-water mark, and to any distance which may be contended for, no part of such distance or space is within the county of Bergen, its eastern boundary being thus described in the statute for *dividing and ascertaining the boundaries of the counties*, and passed as early as 1709-10—"To begin at Constable's-Hook, and so to run up *along* the *bay* and *Hudson's* river, to the partition point between New-Jersey and the province of New-York."—In a former communication, we mentioned that Kill van Kull was to be considered as a *continuation* of the *Sound*, and from the above statute we have since discovered it has always been considered the bounds of the county of Bergen, from where it comes to Pequanack river, being thus described in it:—"And so to run down the said Pequanack and Passaic rivers to the *Sound*, and to follow the Sound to Constable's-Hook, where it began."

As to the intimation, that the duke having granted to lord Berkeley and sir George Carteret "*All the tract of land lying and being to the westward of Long-Island and Manhattan's Island*, that therefore the high-water or *littus* on the eastern side of the Hudson river might be considered as the true and legal line of division," and which, if intended in your first communication to us, escaped our notice, we briefly answer, that the grant is expressed in terms, in our view, materially different from them, as cited by you. It does not grant *all* the land westward of Long-Island and Manhattan's Island, but "all that tract of land *adjacent* to *New-England*, and lying and being to the *westward* of Long-Island and *Manhattan's Island*, and bounded," &c. The tract intended to be granted is designated in *general* terms, as being *adjacent to New-England*, and *westward of Long-Island and Manhattan's Island*, and finally described by *special* or *definite* boundaries.

If the *designation* had finished with the first member of it, *adjacent* to *New-England*, then, perhaps, the whole of the territory which the duke held, except the *eastern* territory expressed in the

grant to him to be a *part* of the main land of *New-England*, would have passed. If it had finished with the second member of it, westward of *Long-Island and Manhattan's Island*, and if the grant itself would not then have been void for uncertainty, we can suppose the western shores of Long-Island and Manhattan's Island would have been its eastern, and the eastern shore of the Delaware its western boundary; but we cannot imagine the rule or principle by which north and south boundaries would have been to be assigned to it. When the *description*, however, assigns boundaries to it by *special* or *definite* terms, as to be distinguished from, or contrasted with the preceding *general* terms, they are to restrain the *general* terms, and confine them to their functions, which was only and *ex abundanti*, to mention the tract in relation generally to its *proximity* to New-England, and its *bearings* from Long-Island and Manhattan's Island, so that we conceive that the question, what is the eastern boundary intended in the grant? as far as it may depend on the *terms* of the description, must depend wholly on the *latter* or *special* or *definite* terms alluded to, without any reference to the *preceding* or *general* terms.

The consideration, that New-Jersey is an independent sovereign state, does not, in our view, vary the case. She was always so, as against New-York, both *de facto* and *de jure*, and in the principles of the American revolution she was always so *de jure* as against Great-Britain, with this exception, that the prince possessing the British crown, for the time being, was her sovereign, entitled and exercising the like powers and prerogatives as in Great-Britain, and if consequences in whom the supreme executive power was vested, and to whom, as possessing especially the *ficial* powers, as they are termed, the powers of *peace* and *war*, the duty of *allegiance* was due, with whose concurrent agency, as a branch of her *legislature*, she could provide for raising armies and maintaining navies, and in every other respect provide for her safety and defence, regulate commerce and navigation, lay and collect duties on exports and imports, and tonnage on vessels, naturalize foreigners, coin moneys, and assert and vindicate her rights as to boundary, and which she actually did as to her northern boundary, except the last; however, all the rights and powers here enumerated, the *indicia* of sovereignty, she has, equally with New-York and every other state in the Union, delegated or ceded to the general sovereignty of the United States, and is now, perhaps, to be more likened to a corporation with certain powers, none more *plenary* than that of life and death for breaches of her own internal peace, and she is no otherwise independent than as she holds these powers independent of the general sovereignty; but still at *the will* of the legislatures or conventions of three-fourths of the several states —neither will any supposed change in her condition by the revolution affect the case. The parliament or legislature of the mother country claimed a right to pass laws binding on the colonies. The colonists claimed to be entitled to like rights with their fellow subjects in Britain, and so not bound by any law to which they

did not assent, or in effect to be sovereign or independent of the parliament.

Attempts were made to define the nature or extent of the sovereignty to be enjoyed or retained by the colonies, or to establish a *fundamental* between the parliament and them, and they to remain members of the empire, thereby to preserve the *unity* of it; all of which failed, inasmuch as they would only have terminated in the incongruous and futile mode of government an *imperium in imperio*, and there being no alternative between an absolute submission to the will of the parliament and the empire remain *entire*, and an absolute independence of such will, and of course a *severance* of the empire, the colonists resolved on the latter. Such is the simple principle of the American revolution. The question was limited as to the *parties*, it being between the parliament and the colonists, and not between the colonists themselves; and also as to its *subject*, it being a mere *legal* question arising on the British constitution. We therefore conclude with stating, that the doctrine that any one of the states acquired as against any other of them, in consequence of the revolution, any territorial rights or an enlargement or extension of territory is inadmissible.

We remain, with due respect,
your obedient servants,

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, James Parker, Lewis Condict, and Alexander C. M'Whorter, esquires, commissioners, &c.

October 3, 1807.

No. XIII.

Gentlemen,

Although it probably was understood that those interchanged on the 3d instant were to close the written communications between us, you will still permit us, in answer to yours, briefly to state, that we have been misconceived if it is supposed that we considered the expression *main sea*, in the grant from the duke, as denoting its *southern boundary*; on the contrary, we contend that *sea* and *ocean*, as they stand in the grant, are to receive different significations, and that the *ocean* is its *southern*, and that the *sea* forms a *part* of its *eastern* boundary, and this interpretation is confirmed by the partition deed between the *proprietors* in 1676, and the two

subsequent grants or *confirmations* from the duke, of the 10th September, 1680. and the 14th March, 1682, in which the boundary of East New-Jersey, from Little Egg-Harbor to the degree of latitude on the Hudson, is described "as extending eastward and northward along the sea *coast* and Hudson's river," and which, by the familiar process of *redendo singula singulis*, and to that end transposing the words, may be made to read, "*extending eastward along the sea coast, and northward along the Hudson river*," and then, as it respects the *eastern* boundary, a case of the nature we have in a former communication suggested, would arise, in which the Hudson ought constructively to be considered as commencing at *Sandy-Hook*. One thing is assuredly evident, that the partition deed and the two subsequent grants suppose the *course* of the *coast* from Little Egg-Harbor towards Sandy-Hook to be, for a distance *easterly*, and if for *any* it must be the *whole* distance, there no where existing a *natural* boundary for *such* a distance less deviating from a right line than that reach or portion of the coast.

We will only add, that the subsequent use of the term *coast* as a *synonyme* of *ocean*, is scarcely to be conceived applicable to a *bay* or *other arm* of the sea, is decisive that our interpretation, as to the different senses in which the terms *ocean* and *sea*, as used in the grant, are to be received is correct.

We remain, with due respect, your obedient servants,

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To William S. Pennington, Aaron Ogden, Alexander C. M'Whorter, James Parker, and Lewis Condict, esquires, commissioners, &c.

October 5, 1807.

No. XIV.

Gentlemen,

Arms of the sea and navigable rivers are subject to a *jus publicum*, a *jus privatum*, and a *jus regium*. To this last right, singly, we meant to apply the propositions arising from the sovereignty of New-Jersey, as distinct from all the other considerations we had therefore laid before you.

We mean explicitly to exclude, under this head, all questions of right or title to territory or property, as arising from the duke's grants, and to confine ourselves merely to this *jus regium*. Under this explanation, we beg you to consider our communication of the second instant, in reference to this particular right.

If it be true, as heretofore stated, that the crown exclusively exercised this *jus regium* (being one of the regalia) in virtue of its prerogative, through the agency of the lords commissioners of trade and plantations, independent of parliament or any colonial assembly, it seems then to follow, that the rights exercised by New-York, of which you speak of your own knowledge before the revolution, must have partaken of the nature of the *jus publicum* and *jus privatum* only, and can have no reference to the *jus regium*, which we presume was never out of the crown of Great Britain while its king was our sovereign.

Suffer us *here* to refer to the many instances of the *jus publicum* and *jus privatum* by New-Jersey, which we have before enumerated, most of which have been within our actual knowledge and observation.

The king, as stated by you, was the sovereign and a component part of the government of New-Jersey, as well as of New-York and Great-Britain at the time of the revolution, whence the conclusion appears to be necessary, that the *jus regium* theretofore exercised by the king over the shores and adjacent waters of that part of the realm called New-Jersey must have naturally devolved upon the sovereignty established in New-Jersey, and not upon the sovereignty established in New-York.

It is submitted to the gentlemen of New-York, under this view of the subject, whether the evidence, to which they have referred, of the jurisdiction *de facto* since the revolution is of such remarkable facts, or can in any way amount to that immemorial usage or prescription right spoken of in public law, and which would oust New-Jersey from all kind of sovereignty and empire in and over its shores and adjoining waters, provided she had acquired such sovereignty by the assertion and vindication of her independence.

We remain, with respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, Joseph C. Yates, esquires, commissioners, &c.

October 5, 1807.

No. XV.

Gentlemen,

After mature deliberation, and due attention to the written communications that have passed between us in our late discussion, we are of opinion, that according to the terms and manifest intention

of the duke of York, in his several grants to lord Berkeley and sir George Carteret and their assigns, that the eastern boundary line passes through the Narrows, and not through the Sound and Kill of Kull; and further, that, in virtue of these grants, as also of sovereignty of the state of New-Jersey, this boundary line extends *usque ad filum aquæ*, or the midway of the river Hudson, or other waters lying between the shores of the two respective states.

We have to request from you an equally explicit opinion.

Should our respective opinions be found unfortunately to differ, then we beg leave further to request from you, generally, your sentiments, as to the probability of accommodating our differences, by establishing a boundary line more convenient to New-York and New-Jersey, respectively, at the same time leaving to New-Jersey all her free navigation, than to run the line according to the opinions of right that may be entertained by the respective boards of commissioners.

Yours, with due respect,

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To EZRA L'HOMMEDIEU, SAMUEL JONES, EGBERT BENSON, and JOSEPH C. YATES, esquires, commissioners, &c.

October 6, 1807.

No. XVI.

GENTLEMEN,

In answer to your note of this day, we can only say, that such are the facts, and such, to our minds, have appeared the reasonings from them, that we have not been able to persuade ourselves otherwise than that New-Jersey cannot rightfully claim Staten-Island, or below the western high-water mark of the waters between the shores of the two states.

The citizens of all the states in the Union have the benefit and use of the navigable waters within the jurisdiction of New-York, in common and equally free with her own citizens, and the citizens of New-Jersey may avail themselves of her existing provisions for gratuitous grants to owners of the adjacent lands, for land below high-water mark.

Still any proposition from you on the ground of consulting the mutual and due convenience of both the states, specifying or defining a line within which New-Jersey is to have the jurisdiction, free in future from the claims of New-York, to the end that her

citizens may then have the benefit or use, without unreasonable detriment to others, or apprehensions of evils of a public or general nature, and which they cannot have if the jurisdiction of New-York is to extend over the whole of the waters in question, it certainly will receive our deliberate, and, we trust, unprejudiced consideration; and at the same time it is submitted, whether inasmuch, as already with respect to the laws of quarantine, and as the period is approaching when, in every other respect, a strict, and, of course, an expensive police will be requisite over the waters in the vicinity of the city of New-York, and that, in order to its being effectual, it must be co-extensive with the waters themselves, it will behove both parties to proceed with caution in a measure of such magnitude, and not to be foreseen in all its consequences.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, Alexander C. M'Whorter, James Parker, and Lewis Condict, esquires, commissioners, &c.

October 6, 1807.

No. XVII.

Gentlemen,

Being so unfortunate as to differ on the question of right, and you having cast back on us the necessity of making proposals for accommodation, we would ask, whether it would accord with your views (should the state of New-Jersey relinquish its claim to Staten-Island) to run the line from the middle of the Hudson river, in the forty-first degree of north latitude, and so down the middle of said river through the bay, the Kill of Kull, and the Sound, but in such manner as to leave the jurisdiction of the Oyster or small islands in New-York?

We remain, with due respect,
your obedient servants,

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Egbert Benson, Samuel Jones, Joseph C. Yates, esquires, commissioners, &c.

October 6, 1807.

No. XVIII.

GENTLEMEN,

We took it for granted, that having declared ourselves definitely against the admission of the claim of New-Jersey, as founded in right, that the propositions of *accommodation*, if any, were to originate on her part. We cannot accede to a proposition by which the middle of the river Hudson, for any distance, shall be the line dividing the jurisdiction.

We are, gentlemen, with due respect, yours, &c.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To AARON OGDEN, WILLIAM S. PENNINGTON, JAMES PARKER, LEWIS CONDICT, and ALEXANDER C. M'WHORTER, esquires, commissioners, &c.

October 6, 1807.

No. XIX.

GENTLEMEN,

Understanding that no line will be agreed upon by you on the principle of an accommodation of differences respecting the eastern boundary line of New-Jersey; and further, that you cannot consent to make any propositions to us upon the subject, permit us to say, that we do not perceive any further utility in continuing the present discussion, unless you have some further communications to make us.

We are respectfully yours,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To EZRA L'HOMMEDIEU, SAMUEL JONES, EGBERT BENSON, and JOSEPH C. YATES, esquires, commissioners, &c.

October 6, 1807.

No. XX.

GENTLEMEN,

We can only repeat, that a proposition of a line having for its object the convenience of the citizens of New-Jersey will be received by us, and in deliberating on it we shall only regard the

considerations we have suggested of benefit and use to accrue to them, of detriment which others may suffer, and of evils to be apprehended to the whole community, and consequently we decline an accommodation on any other grounds.

We are, gentlemen, yours respectfully, &c.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, James Parker, Alexander C. M'Whorter, and Lewis Condict, esquires, commissioners, &c.

No. XXI.

GENTLEMEN,

It is not for the state of New-Jersey to ask and receive *benefits* from the state of New-York—we have not been commissioned for any such purpose.

As the claim of New-Jersey, as stated by us, has unfortunately failed to produce in you a disposition to settle a jurisdictional line upon principles of mutual concession—which principles, and not any conviction of right in New-York, constituted the *basis* on which we made our inquiry in the note of yesterday; and as you will not treat on this basis all other attempts towards accommodation are at an end.

We are at a loss to conjecture where it is you have imbibed an idea so wholly unworthy of us, as that we would treat for the convenience of individual citizens at the expense of the just rights of the state.

We remain, with due respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To Egbert Benson, Ezra L'Hommedieu, Samuel Jones, and Joseph C. Yates, esquires, commissioners, &c.

October 7, 1807.

APPENDIX.

By the honorable Philip Carteret, esq., governor of the province of East New-Jersey, under the right honorable lady Elizabeth Carteret, sole executrix to the right honorable sir George Carteret, knight and baronet, deceased, late lord proprietor of this province, and his council,

To the honorable the governor or commander in chief of all his royal highness' territories in America, at New-York, and his council there.

Whereas I have an order to lay claim to Staten-Island, as properly and justly belonging to the lord proprietor, his government and jurisdiction of this province, and doth appear by his royal highness' grant, under his hand and seal, bearing date the 10th day of September, A. D. 1664.

Wherefore these are in the lord proprietor's name, and, by virtue of the said grant, to demand of you the surrender of the said island unto me, with the quiet possession thereof, and that yourselves, or any other persons by your authority, do forbear the exercising any command, authority, or jurisdiction within the said island; in which I do expect your speedy answer and compliance.

Given under my hand and seal, the 22d July, 1681.

PH. CARTERET.

The letter to captain Arthur Brackett, deputy governor and commander in chief of New-York government, &c.

Sir,

According to my orders, I have sent to Mr. La Prarrie and Mr. Bollin, to demand the surrender of Staten-Island into my possession and government, as of right belonging unto sir George Carteret, lord proprietor of the province, as you may see by the copy of his royal highness' grant, sent you by them; concerning which pray let me have your speedy resolution and answer.

Your humble servant,

PH. CARTERET.

By the honorable Philip Carteret, esq., governor of the province of East New-Jersey, under the right honorable the lady Elizabeth Carteret, sole executrix to the right honorable sir George Carteret, knight and baronet, deceased, late lord proprietor of this province, and his council.

Whereas Staten-Island doth of right belong to the province of East New-Jersey, as doth appear by his royal highness the duke of York's deed of grant, under his hand and seal, bearing date the 10th September, 1680, but hath been detained by several of the governors under his royal high-

ness, contrary to all law and equity; and having now a special order from the lord proprietor to demand the same—These are, in his majesty's name, to will and require you, the magistrates, officers, and inhabitants of the said island, to forbear yielding any obedience to the government or jurisdiction of New-York, or to do or act any thing by their authority or command; but that you forthwith yield obedience to the jurisdiction and government of this province, and receive your commissions, orders, and instructions from me, your lawful governor, as you will answer the contrary at your perils.

Given under my hand and seal, the 22d July, A. D. 1681.

PH. CARTERET.

The foregoing are true copies from lib. iii. page 171, in the office of the proprietors of East New-Jersey, at Perth-Amboy.

JAMES PARKER, *Register.*

September 10, 1807.

Book A, page 2, March 28, 1681.—Directions and instruction to James Bollin esq., secretary of our province of East New-Jersey, from lady Elizabeth Carteret.

"You are to lay claim to Staten-Island, as belonging to us, according to his royal highness' grant; and also the farm at Horsemus, and to take it into possession for my use."

Book iii. page 22, February 15, 1668.—Articles by Philip Carteret, to John Ogden, sen., and others, undertaking a fishing trade; as also the taking and preserving of whales, and such like great fish, &c.

"*Imprimis*—I do give and grant unto the aforenamed John Ogden, Caleb Camitley, Jacob Molleins, William Johnson, and Jeffry Jones and company, and to all or any of them, free leave and liberty to take or kill any whale or whales, or such like great fish, in any place or places where they may be found or taken, whether at sea, or in any creek or cove between Barnegat and the easternmost parts of this province, without any exceptions of drifts or wrecks.

"2d. That the said persons and company shall have free liberty to bring on shore, at any convenient place or places within the bounds and limits before mentioned, all such whales or great fish as they shall find, kill, or take, and to erect huts or cabins on any person's land by the water-side, upon occasion, for their better preservation of the said whales or great fish, and trying them for the making of oil, or curing of other fish they shall take; provided they do not trespass upon corn-fields, nor damage to the stock or cattle of any such persons upon whose grounds they shall come.

"3d. Extends the limits of the charter to three years.

"4th. That, for the encouragement of the said persons and company in the prosecution of this design, I do promise and grant unto them, in case Staten-Island falls within this government, some convenient place or tract of land upon the said island, near unto the water-side, fit for the settlement of a town, or society, to consist of twenty-four families; and that they shall have a competent proportion of land allotted to each family or lot, with meadow ground as well as planting land, and free commonage upon the island—each family or lot to pay, as a quit-rent, to the lords proprietors, their heirs, or assigns, one bushel of wheat yearly."

Book 3. page 27, June 21, 1669.—License from Philip Carteret, governor, &c., to Peter Hetfelsen, "to be the only and constant ferryman between Communepau and the city of New-York, for three years."

Same book, page 52, January 18, 1671.—License to Job Simerson, ferryman, between Bergen, Communepau, and New-York, "with rates and conditions as was formerly granted to Peter Hetfelsen."

Same book, page 152, February 14, 1678.—License to Joseph Hunt and others to take whales, &c., within the same bounds as above granted in page 22.

Minutes of board of proprietors, A B, page 13.—At a meeting and council of the proprietors and proxies—to proprietors of the province, 10th May, 1685.

Present the deputy governor, &c.—"Petition from John Palmer, esq, to have a patent for the lands he has had and taken up on Staten-Island, upon consideration thereof, and that it may be of no ill consequence, but rather of service, in our claim to that island—It is agreed and ordered, that the governor and council may make a patent of the same to him."

Book A, page 185, May 26, 1684.—Patent from the proprietors of East New Jersey to John Palmer, of Staten-Island, within the said province, esquire, "All that his capital messuage or dwelling house, with the appurtenances, situate, lying, and being on the north side of Staten-Island aforesaid, within Constable-Hook, near the mill creek, lately erected and built by the said John Palmer, and in the possession of the said John or his assigns; and all that other parcel or tract of land," &c.

This patent is for seven tracts, containing in all 4,500 acres.

Book C, two commissions, page 1, August 4, 1718.—Charter to the city of Perth-Amboy, by governor Richard Hunter, describes the bounds as follows:—"Beginning upon the north side of the Raritan river, by the upper corner of that called Peter Sonman's land, and by the lower corner of that now in the possession of James Moore, of Woodbridge; thence extending on a straight line, as said Moore's land goes, to land now possessed by John Veal; thence, continuing along the said Veal's land, to the north-east corner thereof; from thence, extending upon a direct line, to the south-west corner of David Herriot's land, and so extending along by said Herriot's to the south-east corner thereof; from thence extending on a straight line to the south-westerly corner of the land lately in the tenure and occupation of John Carhart, formerly one Henry Lessembus, and so along the line thereof, easterly as it goes, to the meadow or marsh on the north side of a gully, where water generally runs; thence extending on a direct east line through the marsh and sound to low-water mark, on the easterly side thereof; from thence running down the sound southerly, as far as the southernmost point of Staten Island; from thence, on a direct line, to where George Willock's plantation, called Rudyard's, adjoins by a creek to that plantation, of late belonging to Andrew Bowne, deceased; thence, extending along the lines of said Bowne's land, (excluding the same) to Matewan creek; thence, up the creek to a bridge thereon, where the highway from Amboy ferry to Freehold and Middletown crosseth the same; thence, extending along the partition line betwixt the counties of Middlesex and Monmouth, to Millstone brook; thence, down the said brook, to the post road; thence, along the same, to South-River, as it goes to Raritan river, and so down Raritan river (including the said river) to high-water mark on the north side thereof, to where the limits of the said town are said to begin."

Book C, 3. page 224, January 7, 1783.—License from governor Basby

to Archibald Kennedy, of New-York, to settle a ferry in the county of Bergen, in the province of East New-Jersey, to carry passengers from thence to New-York, and from New York thither.

Elisha Parker's warrant for 199 47-100 acres, W 2. 16. Archibald Kennedy's, 10 9-100 acres, A B 2 for 226—10 9-100 acres in full—to Archibald Kennedy.—"These do certify, that Elisha Parker, by me duly deputed and sworn to the intent herein after mentioned, did survey for Archibald Kennedy, esq., a certain island situate in Hudson's river, in the county of Bergen, and eastern division of New-Jersey, called and known by the name of Bedlow's Island: beginning at a stake standing one chain and sixteen links distant upon a south, thirty-two degrees and a half east, course from a small cedar tree growing out of the side of the bank on the south-easterly side of the said island, and from the said stake running west four chains and five links; thence north, forty-eight degrees and a half west, five chains and five links; thence north, twenty-six degrees west, three chains and five links; thence north, three degrees and a half west, seven chains and three links; thence north, four degrees east, one chain and seven links; thence south, eighty-two degrees east, six chains and sixty-seven links; thence, and south, forty seven degrees and a half east, four chains and fifty five links; thence south, fifteen degrees and a half east, four chains and five links; thence south, fourteen degrees west, six chains and forty links, to the beginning, (at one chain and ten links of the last course the house bore north, seventy degrees west, at one chain and one link distant) containing eleven acres and forty-two hundredths of an acre, strict measure. which, after allowance, is to remain for ten acres and nine-tenths of an acre, to which Archibald Kennedy is entitled by virtue of a deed to him from Elisha Parker for the said quantity of ten acres and nine tenths of an acre of land unappropriated, dated the 18th day of February, 1746-7, and recorded in lib. A. B. 2. fol. 26, to grant which the said Elisha had right in part of his warrant from the council of proprietors of the eastern division of New-Jersey aforesaid for 199 47-100 acres of land, dated the 21st May, 1744, and recorded in lib. W. 2. fol. 16.

"Witness my hand, this nineteenth day of February, 1746.

"JAMES ALEXANDER, sen."

The foregoing is a true copy from book S. 2. page 169, in the office of the proprietors of East New-Jersey at Perth-Amboy, September 10, 1807.

Book B. 2. page 251, Nov. 14. 1719.—Patent from governor Morris to George Wilcocks, to keep a ferry from Amboy to Staten-Island.

Book F. page 742, Sept. 15, 1697.—Patent to George Wilcocks, for sundry water lots in Amboy, extending into the Sound to low-water mark.

Book C. page 70, August 26, 1698.—Patent to the same, for other water lots extending to low-water mark in the Sound.

Book G. page 61, May 1, 1699.—Patent to Thomas Gordon, for two lots extending to low-water mark in the Sound.

BERGEN COUNTY, *ss.*

Cornelius Van Vorst, of Aharsimus, in the county of Bergen, being duly sworn, deposeth and saith, that he is now in the seventy-ninth year of his age; that he was born where he now lives, and has resided at Aharsimus ever since his birth; that this deponent has been acquainted with the shore on the west side of the Hudson river, and what is now called New-York

bay, ever since he was a boy; that this deponent has known that the inhabitants of the town of Bergen have uniformly exercised the right of oystering and fishing in the Hudson river and bay aforesaid ever since his recollection, and that the said inhabitants of Bergen have also exercised the right of setting fikes upon the flats, and of continuing their extension from the shore into the river or bay from year to year, and that this deponent has also set fike fences, oystered, and fished in the said river and bay and upon the flats; and this deponent further saith, that he never knew any of the people of New York exercise the right of setting fike fences upon the flats or on the west side of the Hudson's river or bay aforesaid, within the limits aforesaid, excepting one person, about two years ago, who this deponent understood had set a fike fence between the two islands, but of this this deponent has no certain knowledge; and this deponent further saith, that, when a boy, he understood from the old inhabitants of Bergen, that it had been the practice at the town-meetings of the corporation of Bergen they appointed certain officers, who they called water-bailiffs whose particular duty it was to apprehend offenders upon the waters within the said township, which were considered to include those from the western shore of Hudson river and west of the bay aforesaid, to the deep waters in said river and bay; that this deponent understood that Jacob Vanhorn and Minard Garebrants were two of the persons who held the said office of water-bailiffs, and that said bailiffs did frequently apprehend persons belonging to the city of New-York oystering upon the flats, and bring them before the authority then in Bergen; and this deponent further saith, that he never understood that any legal measures were taken by the persons from New York thus apprehended in defence of the right; but this deponent was informed, that, after some time, a number of the people of New-York came over armed with muskets, and drove off the said bailiffs; and this deponent further saith, the records of the annual proceedings of the corporation of Bergen, of the year of which this deponent now speaks, have been lost or destroyed.

And this deponent further saith, that he established the present ferry at Jersey, (then Powles-Hook) about forty years ago; that he built a dock and ferry-stairs, for the accommodation thereof, into Hudson's river, beyond low-water mark, and that no objection was made by the people or corporation of New-York for his so doing; that since the first establishment of the ferry aforesaid he has extended the ferry-stairs and dock still further into the Hudson river, and no objection was then made by the people or corporation of New-York for his so doing; and this deponent saith, that the said ferry has been established ever since the memory of this deponent, and that the ferry at Hoboken has been established nearly as long as the ferry at Powles-Hook; that the ferry-stairs and dock, as well at Weekauk as Hoboken, have for many years been extended beyond low-water mark in the Hudson river, and that this deponent never heard any objection made thereto by the people or corporation of New-York, or any difficulty suggested on account thereof.

And this deponent further saith, that a few years since, how many this deponent cannot now recollect, but since Mr. Vanedyne Elsworth first came to live at Powles-Hook, a certain William Slow, as this deponent understood, came over from New-York, by the directions of the corporation, and cut the nets of some of the people of Bergen, and set them, and went to fishing himself; that the said William Slow was prosecuted before Daniel Van Ryper, esq., of Bergen, by the person injured, and judgment obtained for the damages, and execution issued thereon, and the net

taken by virtue thereof, and carried into Bergen, where it remained a few days, when this deponent understood the said Slow came over by order of the corporation, and paid the damages and costs, and took the net away.

And this deponent further saith, the next season after the before mentioned transaction took place, one alderman and two assistants of the corporation of New-York came over to this deponent, and asked permission to fish for the use of the alms-house, which this deponent permitted them to do; since which this deponent does not recollect any interference has been made by the corporation or people of New-York with the right of fishing of the people of Bergen, nor have they since requested permission to fish, to this deponent's knowledge, but this deponent believes that the people of New York, as well as from some parts of Jersey, have practised oystering upon the flats, and in Hudson river and New-York bay.—And further this deponent saith not.

CORNELIUS VAN VORST.

Sworn before me, this 26th September, 1807.

(SEAL.) PHILIP WILLIAMS, *Notary Public.*

And whereof an acknowledgment being required, I have granted the same under my notarial form and seal, at the town of Jersey, the day and year above written.

PHILIP WILLIAMS, *Notary Public.*

MESSAGE

OF

HIS EXCELLENCY THE GOVERNOR,

TOGETHER WITH

THE REPORT

OF THE

COMMISSIONERS APPOINTED ON THE PART

OF THE

State of New-Jersey,

TO SETTLE THE QUESTION OF TERRITORY AND JURISDICTION

IN DISPUTE WITH THE

STATE OF NEW-YORK,

&c. &c.

FEBRUARY, 1828.

TRENTON:

PRINTED FOR THE STATE BY JOSEPH JUSTICE.

.....

1828.

MESSAGE, &c.

EXECUTIVE DEPARTMENT, TRENTON FEB. 4, 1826.

Gentlemen of the Legislative Council,
and of the General Assembly.

I LAY before you a report and statement of the claims of New-Jersey to the Hudson river and Staten Island, by the commissioners appointed under the authority of this state, to negotiate an amicable settlement of the existing differences between the states of New-Jersey and New-York, respecting boundary and jurisdiction; from which you will learn, that notwithstanding the commissioners on the part of this state, have manifested the strongest desire to effect a settlement of these differences, by offering to make great sacrifices of the just rights of this state, to attain that desirable object, and by insisting on no conditions incompatible with either the honour or the interest of that state to have conceded to us: yet the negotiation has not had a satisfactory issue.

The repeated overtures which have been made on the part of New-Jersey, as well as the liberal terms of compromise offered by our commissioners, cannot fail to place in a strong light the constant and strong disposition on the part of this state, to remove every source of irritation and dispute, and to terminate in any reasonable and satisfactory mode, the unhappy differences between the two states.

In 1806, her legislature made advances for that purpose, by appointing commissioners to meet commissioners, to be appointed on the part of New-York, to settle the limits within which the respective states should exercise jurisdiction on the waters lying between their shores, and to determine the eastern boundary line of New-Jersey; when the commissioners appointed

by the respective states attempted, but without success, to settle the question of strict right.

In 1818, New-Jersey made a new proposition to settle the controversy, and offered to appoint commissioners to agree with commissioners to be appointed by New-York, to make a statement of facts, relative to the controversy, to be submitted to the decision of the Supreme Court of the United States, which, by the federal constitution, has original jurisdiction of all controversies between two or more states; and where the questions of boundary and jurisdiction, might have been temperately discussed, and fairly and justly decided; but which overture remains to this day unanswered.

As the legislature of New-York, by their silence, declined a judicial decision of the matters in controversy in, 1824 the legislature of this state, in the hope that an amicable adjustment of the differences might be made to the advantage of both states, upon the principles of compromise and mutual concessions; and without agitating the question of right, about which the former commissioners had disagreed, passed an act for that purpose, authorizing the appointment of commissioners by the executive of this state, to meet commissioners to be appointed on the part of New-York; but the time limited in our act was suffered to expire without the legislature of New-York passing a corresponding law on their part.

In the year 1826, the deputy sheriff of Richmond county was arrested and indicted in this state, for serving process within the jurisdiction of New-Jersey, under the authority of the laws of New-York; when upon an application from the governor of New-York, the executive of this state directed all further proceedings against that officer to be suspended, until after the meeting of the legislatures of the two states, in hopes that the New-York legislature might be induced by the perilous situtation in which one of her officers was placed, in consequence of the conflicting claims between the two states, to agree to some fair mode of settling the controversy; and thereby render unnecessary the further prosecution of that officer, for the purpose of maintaining our jurisdiction.

And in the same year, upon an informal intimation of the governor of New-York, to the executive of this state, that if the time was enlarged by our legislature for the appointment of commissioners by the respective states, commissioners would probably be appointed on the part of New-York, our legislature passed an act for that purpose, which was duly communicated to the governor of New-York; but which was tardily met by the legislature of that state, and under circumstances which gave but little promise of a favourable issue. And it is worthy of remark, that pending the negotiation, and whilst our commissioners were actually attending at Albany to meet the commissioners of New-York, a bill passed one branch of her legislature, and which subsequently became a law, asserting and declaring the boundary line of that state to extend "along the west shore at low water mark of Hudson river, of the Kill Van Kull of the sound between Staten Island and New-Jersey, and of Raritan Bay to Sandy Hook"; thereby extending their claim of territory much farther than had ever before been done by any legislative exactment.

This government certainly had a right to expect, that pending the negotiation for an amicable settlement of the differences, on conditions honourable and satisfactory to both parties, all things would have been permitted to remain as they were, and that their legislature would have forborne to make a new assertion of their claims, and especially one which they could not seriously suppose that New-Jersey would ever acquiesce in, as the basis of an amicable settlement.

Under such circumstances, it is not a matter of much surprise, that the New-York commissioners should reject all terms of compromise which implied an acknowledgment by them, of the right of this state to any part of the waters of the Hudson river, and should offer to us as matters of favour and gratuity, rights and privileges upon our own wharves, and along our own shores, with some other trifling privileges of little or no value: terms of settlement which were promptly and justly rejected by our commissioners.

This conduct, so different from that sense of justice, magna-

nimity, and amity, that ought to exist between "independent communities," renders all further attempts on the part of this state at compromise and settlement, entirely hopeless, and leaves us no alternative, but by enforcing the laws of the state, to support its jurisdiction, and which have heretofore been successful in resisting all open attempts to encroach upon our rights or territory.

The assertion, which has been repeatedly made, "that New-York is in the exclusive possession of the disputed waters, and in the actual and constant exercise of exclusive jurisdiction over them," is totally unfounded, and is most fully disproved by the constant exercise of jurisdiction, by this state, over those waters, and the actual use of them by our citizens, for all useful and necessary purposes; and by the wharves and piers which have been, and are constantly erecting, under the laws of this state, along our shores, and extending beyond low water mark; and which encroachments upon their claims of jurisdiction, have, for many years past, afforded to that state fair opportunities to bring the question of boundary between the two states, to a legal decision: but it appears that the state of New-York chooses rather to submit to all those encroachments upon the territorial limits claimed by her, than to try the question of title between the two states. And, as a further proof of the unwillingness, on the part of that state, to bring their claims to a judicial decision, I refer to the fact, that, upwards of twenty years ago, the corporation of the city of New-York commenced an action at law against certain individuals for a trespass, or usurpation upon their rights, building the first piers at Jersey City, which are extended into the Hudson river, far beyond low water mark; but which action, since the service of the process, has not been further prosecuted, no doubt from a consciousness of the weakness of their title, and a reluctance to bring it to the test of a judicial investigation. And since that time, other piers have been erected at that city, extending into the Hudson river, for which no action whatever has been brought; whereas no trespass upon our territory, or violation of our rights, has occurred, or is likely to occur, to afford to this state an opportunity of bringing to a legal decision, by the

ordinary process of law, any question between the two states, as to boundary or jurisdiction. And, by a report made in the senate of New-York, on the 12th of February, 1827, by a committee on the judiciary, relative to the New-Jersey boundary, it is made a question, whether "the article of the constitution of the United States, which extends the federal power to controversies between two or more states, gives the Supreme Court of the United States cognizance of questions which may arise between members of the confederacy, as to their *sovereignty* and *jurisdiction;*" and if that court does not possess jurisdiction to settle and determine all such questions, then New-Jersey has no means within her own power to bring the controversy to a final decision, and must, from necessity, rely upon her laws, and the vigilance of her citizens, for the support and maintenance of her just rights, until a returning sense of justice and amity shall induce that state to submit her claims to some peaceable mode of decision.

Since the failure of the negotiation, I have given notice to the prosecuting attorney, that the reasons which induced me to direct a suspension of the proceedings against the deputy sheriff of Richmond county, no longer exist; and that he is at liberty to proceed with the prosecution against him.

I recommend to your consideration, whether any further legislative provision is necessary to secure our citizens in the peaceable possession of their rights, and to prevent any further usurpation of authority within the eastern boundary of this state; and whether any process of law can be resorted to, to bring the controversy between the states of New-Jersey and New-York to a legal decision within a reasonable time.

It will also be necessary for the legislature to make provision for compensating the commissioners on the part of this state for their services, and the very satisfactory manner in which they have discharged the duty required of them.

ISAAC H. WILLIAMSON.

REPORT

OF THE

COMMISSIONERS, &c.

To the Honourable the Legislative Council and General Assembly of the State of New-Jersey.

THE undersigned commissioners, appointed on the part of the state of New-Jersey, to settle the questions of territory and jurisdiction in dispute with the state of New-York,

RESPECTFULLY REPORT:

That soon after they received their appointment and commission from his excellency the governor of this state, they met at Trenton, duly organized themselves into a board, for the regular prosecution of the duties of their commission, and notified the commissioners on the part of the state of New-York, of their readiness to proceed with the negotiation. A meeting of the two boards was arranged to take place at Newark, on the first day of August last, and was accordingly held.

Your commissioners, after full deliberation, concluded that it would be proper in the first instance, to waive the formal investigation of the claims of New-Jersey over the waters lying between the two states; and to endeavour, in the spirit of the act which created their powers, and by an amicable negotiation, conducted upon principles of mutual concession, to settle the controversy upon terms equitable and just.

They were the more disposed to this course, when it was considered that the question of title had been long before the public, and had received an able discussion at a meeting of commissioners, heretofore appointed by the two states for the same objects.

And moreover, your commissioners at their first meeting with the commissioners of New-York in August last, perceived no disposition on their part, to engage in a formal investigation of

the title; and it was suggested, that propositions in writing, of an adjustment of the existing difficulties on the waters of the Hudson river and the sound, should be made and interchanged by the respective boards.

This was accordingly done, in the hope of thereby arriving at some basis of settlement, where the two states might meet in harmony, and thus terminate a protracted and unhappy controversy.

The proposition No. 1, submitted by your commissioners, in substance embraced the principles of the agreement heretofore made between the states of New-Jersey and Pennsylvania, with respect to the river Delaware; and under which convention, they have experienced no inconvenience, but great benefit, in the common use of those waters.

On receiving the proposition of the commissioners of New-York, marked No. 2, in exchange for their first proposition, your commissioners were surprised to perceive, that the commissioners of New-York did not propose to negotiate on the principles of equality of right; but therein considered themselves in the exclusive and decided possession of the whole waters of the Hudson river, and were only willing to concede to New-Jersey, and that with a sparing hand, certain specified privileges.

The undersigned promptly apprised them, that they could not negotiate upon such a basis, and that any convention made upon such terms would not only be repugnant to our own convictions of the rights of New-Jersey, but would never receive the sanction of our legislature.

The commissioners on the part of New-York, professing a desire to settle the controversy, proposed that further efforts should be made by the modifications of their respective propositions; and accordingly, at a subsequent meeting at Newark and at several succeeding meetings at Albany, the subjoined propositions, marked No. 1, 2, 3, 4, 5, 6, 7, and 8, were interchanged.

In all of which, on the part of New-York, the undersigned

regret to state, as your honourable bodies will perceive, the exclusive right and jurisdiction of the state of New-York over the Hudson, is considered as unquestionable and conclusive, and in the powers conceded to the state of New-Jersey, we could not fail to be struck with the guarded restrictions, that by necessary construction, effectually excluded her from even a concurrent jurisdiction over any portion of these common waters.

In the terms of settlement submitted by your commissioners, they endeavoured to remove any just ground of exception, by yielding to New-York exclusive jurisdiction over the adjoining waters in several important matters, which the health and commercial welfare of the city of New-York seemed to require. As that great and rapidly increasing emporium of commerce, is identified with our national prosperity, and maintains very intimate and constant relations in business, with the state of New-Jersey, we deemed these concessions to be justified, as well by sound public policy, as by the spirit of accommodation, with which we approached the duty assigned to us.

Influenced by a desire to promote those friendly feelings, so essential to the well being of sister states, we further proposed to relinquish the claims of New-Jersey to Staten Island and the adjacent small islands in the intermediate waters.

After several conferences with the commissioners of New-York at Albany, that only furnished additional proof of their determination to adhere to the principles of their first proposition, the undersigned became convinced, that further negotiation would be fruitless, and therefore concluded it, by addressing to them the note marked A, the answer to which marked B, and the further correspondence, marked C, and D, are hereto subjoined.

Believing, as we firmly did, that New-Jersey possessed at least, equal and concurrent rights over the Hudson, and the other dividing waters, and that her property rightfully extended to the middle of that river, we could not consistently extend the concessions of New-Jersey beyond the terms of our propositions.

We have deemed it proper to submit with our report, a statement of the claims of New-Jersey, to the Hudson river and Staten Island, and the reasons in law, on which those claims are founded.

RICHARD STOCKTON,
JOHN RUTHERFURD,
THEODORE FRELINGHUYSEN,
LUCIUS Q. C. ELMER,
JAMES PARKER.

FIRST PROPOSITION ON THE PART OF NEW-JERSEY.

The commissioners of New-Jersey, by way of friendly compromise and settlement of their territorial and jurisdictional disputes with the state of New York, and without discussing or by this proposal, affecting the question of right on the part of either state, proposed to the commissioners of New-York the following terms:

1. That the waters of the Hudson river, south of the forty-first degree of north latitude and north-west of a line drawn from the south-west point of the Battery, in the city of New-York, to Staten Island, and the waters between Staten Island and the main land, excluding Newark bay, be the boundary between the two states, and a common highway, equally free and open for the use, benefit, and advantage of both parties; the rights of fishing, docking, wharfing, and improving upon, and adjacent to the shores of each state, respectively, to be full, free, and exclusive, so that nothing shall be done that will tend to obstruct or impair the navigation.

2. That each state enjoy and exercise a concurrent jurisdiction within and upon the aforesaid waters, but so that every ship or other vessel being in the said waters, and bona fide, departing from, bound to, or riding at anchor before any city or town in either state, where she hath last laden, unladen, or departed, or where it is intended she shall first thereafter lade, unlade, or enter, be considered exclusively within the ju-

risdiction of such state; and every vessel fastened to, or aground on the shore of either state, shall in like manner be considered exclusively within the jurisdiction of such state.

3. That the islands called Bedlow's Island, Ellis' Island, Oyster Island, and Robins' Reef, to low water mark of the same, be held to be and remain within the exclusive jurisdiction of the state of New-York.

FIRST PROPOSITION ON THE PART OF NEW-YORK.

The state of New-Jersey shall enjoy and exercise exclusive jurisdiction on all the wharves and land now made, or which may hereafter be made on the west shore of the Hudson river, from the northern boundary of the state of New-Jersey along the said shore, as well as natural alluvion, to the actual line of low water, provided such wharves and piers do not impede or obstruct the navigation of said river; and process issuing out of any of the courts of said state, or from any magistrate thereof duly authorized, may be served upon any person indebted within the said state, on contracts arising therein, or charged with having committed any offence within said state, and who may be on board of any vessel fastened to, or along side of such wharves, or aground on said shore, or who may have committed any trespass or offence on board of any vessel so situated.

SECOND PROPOSITION ON THE PART OF NEW-JERSEY.

1. The waters of the Hudson and between Staten Island and the main land, to be the boundary between the two states, and a common highway for both parties, and New-Jersey to relinquish all claim to Staten Island and the islands in the above waters now claimed and possessed by New-York.

2. The state of New-York to have the exclusive jurisdiction in and over the waters of the Hudson, with the following exceptions, *viz.* New-Jersey to have the exclusive right to regulate

and exercise jurisdiction over wharves, docks, and other improvements made or to be made on the New-Jersey shore and the fisheries on the west side of the channel, so that the navigation be not obstructed or injured; and New-Jersey to have also exclusive jurisdiction over vessels bound to, or departing from any place in New-Jersey, or riding at anchor before any place in New-Jersey where she hath last laden or unladen, or where it is intended she shall first thereafter either lade or unlade, so that the said vessels shall be considered as subject to such general quarantine laws of the state of New-York as the vessels of their own state are or may be subject to, provided that such vessels may be permitted to discharge their cargoes, subject to such quarantine regulations at any port in the state of New-Jersey, instead of Brooklyn or any other port in the state of New-York: and jurisdiction over property taken out of New-Jersey, to evade due process of law, and over persons for acts committed, or debts contracted in New-Jersey, and also concurrent jurisdiction as to offences committed, or trespasses done by citizens of New-Jersey on the west side of the main channel.

3. The state of New-Jersey to have the exclusive jurisdiction over the waters between Staten Island and the main land, with the same exceptions in favour of New-York as are contained in the above article in favour of New-Jersey.

SECOND PROPOSITION ON THE PART OF THE STATE OF NEW YORK.

The commissioners of the state of New-York, by way of making a friendly compact between the states of New-York and New-Jersey, that delinquents and offenders in and against the state of New-Jersey, may be brought to justice, and the dispute between the two states as to jurisdiction and limits, may be amicably adjusted, make the following propositions to the commissioners of New-Jersey, the making of such propositions not to affect any question of right between the two states.

1. The inhabitants of New-Jersey, in common with the in-

habitants of the state of New-York, shall enjoy the fisheries on the west side of the Hudson river, from the northern boundary of the state of New-Jersey, southwardly along said state, and in the waters between Staten Island and New-Jersey, to be so used however as not to injure the channels or impede or obstruct the free and safe navigation of the said river.

2. The state of New-Jersey shall enjoy and exercise exclusive jurisdiction on all the wharves and land now made, or which may hereafter be made on the shore of the state of New-Jersey, opposite to the state of New-York, and also to low water along the whole of said shore, and that civil process issuing out of any of the courts of said state, or from any magistrate thereof duly authorized, may be served upon any person or persons indebted, or liable upon any contract made within the said state, or who may have committed any wrong therein, and which person or persons may be on board of any vessel fastened to or by the side of such wharves, or aground on such shore, provided that such person or persons shall not then be under arrest by virtue of any process or authority of the state of New-York.

3. The state of New-Jersey shall also have the right of serving criminal process upon all the waters of the Hudson river, lying between the states of New-York and New-Jersey, and upon all the waters between the shores of Staten Island and New-Jersey, for crimes and offences committed upon the land above low water, and within the said state of New-Jersey; such process not to be served upon any person or persons, on board of any vessel attached to, lying at, lading or unlading at, or by any wharf, pier or shore, in the state of New-York, or anchored in any of said waters for the purpose of lading, or unlading as aforesaid, or who may then be under arrest by virtue of any process, or authority of the state of New-York.

4. The state of New-York shall have the right to exercise all jurisdiction, power and authority, over the said waters, other than such as herein secured to the state of New-Jersey.

THIRD PROPOSITION ON THE PART OF NEW-JERSEY.

1. The waters of the Hudson river, and the other waters between the two states, to be the boundary and a common highway for both parties.

2. Each state shall have the exclusive jurisdiction and regulation of wharves, docks, and other improvements, made or to be made on its own shores, and of the fisheries adjacent to its shores, provided that the navigation be not obstructed or injured. All vessels fastened to or aground on the shore of either state, shall be considered as exclusively within the jurisdiction of such state, as shall also, all vessels bona fide, bound to, or from such state.

3. Each state shall have concurrent jurisdiction in the service of civil process, issued for the enforcement of any contract made, or wrong done or committed within such state; and also for the service of criminal process for offences committed against such state.

4. The state of New-York shall exercise exclusive jurisdiction over the waters of the Hudson river and bay of New-York, in the enforcement and execution of her health laws, and all other jurisdiction, power, and authority over the said waters, in every case not herein before stipulated; and the state of New-Jersey shall exercise exclusive jurisdiction over all the other waters between the two states, in the enforcing and execution of her health laws, and all other jurisdiction, power, and authority, in every case not herein before stipulated.

5. The state of New-Jersey to relinquish all claims to Staten Island and the other islands in the waters between the two states now claimed and possessed by New-York.

THIRD PROPOSITION ON THE PART OF NEW-YORK.

1. The inhabitants of New-Jersey, in common with the inhabitants of the state of New-York, shall enjoy the fisheries in that part of the Hudson river, which is east of the shore of New-

Jersey, and also in the waters between Staten Island and the New-Jersey shore; but the state of New-Jersey shall have the right of regulating the fisheries on the west side of the said waters, between Staten Island and New-Jersey, to be so regulated, however, as not to impede or obstruct the free and safe navigation of the said waters.

2. The state of New-Jersey shall enjoy and exercise exclusive jurisdiction on all the wharves and land, now made, or which may hereafter be made, on or adjoining the shore of New-Jersey, opposite the state of New-York, and also to low water mark along the whole of the said shore; and civil process issuing out of any of the courts of said state, or from any magistrate thereof duly authorized, may be served upon any person or persons indebted, or liable on any contracts made within the said state, or who may have committed any wrong therein, and which person or persons may be on board of any vessel fastened to, or by the side of such wharves, or aground on said shore, provided that such person or persons, shall not then be under arrest, by virtue of any process or authority of the state of New-York.

3. The state of New-Jersey shall also have the right of serving criminal process upon all the waters of the Hudson river, lying between the shores of New-York and New-Jersey, and upon the waters between the shores of Staten Island and New-Jersey, for crimes and offences committed upon the land, above the natural low water, on the shore of New-Jersey, or upon any wharf or land now made, or which may hereafter be made, on or adjoining the said shore; such process not to be served upon any person or persons, on board of any vessel attached to, lying at, lading or unlading at or by any wharf, pier, or shore, in the state of New-York, or anchored in any of said waters, for the purpose of lading or unlading as aforesaid, or who may then be under arrest, by virtue of process or authority of the state of New-York.

4. The state of New-Jersey shall also have the right of serving process, issued in pursuance of the laws of that state, upon all property taken out of New-Jersey to evade due process of

law, in all places where the right to serve criminal process, issued under the authority of the state of New-Jersey, is provided for by the foregoing article: provided that such property shall not have been seized or levied upon, under or by virtue of process, issued under the authority of the state of New-York, so as to render it subject to the exigency of such process, by virtue of such seizure, according to the laws of the state of New-York.

5. The state of New-York shall have the right to exercise all jurisdiction, power and authority, over the said waters, other than such as are herein secured to the state of New-Jersey.

FOURTH PROPOSITION ON THE PART OF NEW-JERSEY.

1. The waters of the Hudson river and the other waters between the two states, to be the boundary, and a common highway for both parties.

2. Each state shall have the exclusive jurisdiction and regulation of wharves, docks and other improvements, made or to be made on its own shores, and of the fisheries adjacent to its shores: provided that the navigation be not obstructed or injured. All vessels fastened to, or aground on the shore of either state, shall be considered exclusively within the jurisdiction of such state.

3. Each state shall have concurrent jurisdiction over the said waters, in the service of process issued for the enforcement of any contract made, or wrong done or committed within such state; and also for the service of criminal process, for offences committed against such state above low water mark: provided, that as to civil process for the enforcement of any such contract, the citizens of the said states of New-York and New-Jersey shall not be subject to arrest on the said waters, by process issuing from the courts of either state against the citizens of the other.

4. The state of New-Jersey shall have concurrent jurisdiction for all offences committed by her citizens on the waters of the Hudson adjacent to New-Jersey; and the state of New-York

shall have concurrent jurisdiction for all offences committed by her citizens on the other waters between the two states, adjacent to the state of New-York.

5. The state of New-York shall exercise exclusive jurisdiction over the waters of the Hudson river and bay of New-York, in the enforcing and execution of her health laws, and all other jurisdiction, power and authority over the said waters, in every case not herein before stipulated: provided that the same shall be in every respect, equal and reciprocal as to the two states. And the state of New-Jersey shall exercise exclusive jurisdiction over all the other waters between the two states, in the enforcing and execution of her health laws, and all other jurisdiction, power and authority over the said waters, in every case not herein before stipulated: provided that the said exclusive jurisdiction, shall be in its exercise, in every respect equal and reciprocal as to the two states.

6. The state of New-Jersey to relinquish all claims to Staten Island and the other islands in the waters between the two states, now claimed and possessed by New-York.

FOURTH PROPOSITION ON THE PART OF NEW-YORK.

1. The state of New-Jersey shall have exclusive jurisdiction over all the waters on the west side of the channel between Staten Island and New-Jersey, and on all the wharves, piers and land now made or to be made on or adjoining the shore of New-Jersey, opposite the state of New-York, and also to low water mark along the whole of said shore, and also on all vessels fastened to or by the side of any such wharf or pier, or aground on said shore: provided however, that the said vessels and their officers, crews and passengers, and also the waters above mentioned, and all vessels therein, with their officers, crews and passengers, shall be subject to the jurisdiction of New-York for the enforcing of such quarantine and health laws, and such laws relating to passengers as now exist, or may hereafter be passed under the authority of that state.

2. The state of New-Jersey shall have the right to serve all civil process over all the waters between the shores of the two states, upon any person or persons domiciled in the said state of New-Jersey: provided such person or persons shall not then be on board of any vessel attached to, lying at, lading or unlading at or by any shore in the state of New-York, or any wharf or pier adjacent to such shore, or anchored in any of the said waters, for the purpose of lading or unlading as aforesaid: and provided also, that such person or persons shall not then be under arrest by virtue of process or authority of the state of New-York.

3. The state of New-Jersey shall also have the right of serving criminal process wherever the right of serving civil process is provided for by the foregoing article, for all crimes and offences against the laws of said state, committed upon the land above the natural low water mark on the shore of said state, or in any place where the jurisdiction of said state is provided for in the first article: provided the person or persons against whom such process shall have been issued, shall not be at the time of its service, under arrest by virtue of any process or authority of the state of New-York.

4. The state of New-Jersey shall also have the right of serving process issued in pursuance of the laws of that state, upon all property taken out of that state to evade due process of law, in all places where the right to serve civil process upon persons domiciled in said state is provided for in the said article: provided that such property shall not have been seized or levied upon under or by virtue of process issued under the authority of the state of New-York, so as to render it subject to the exigency of such process, by virtue of such seizure, according to the laws of that state.

5. The state of New-York shall have the right to exercise all jurisdiction, power and authority over all the said waters other than such as are herein secured to the state of New-Jersey.

A.

Letter from the New-Jersey, to the New-York Commissioners.

The undersigned, commissioners of the state of New-Jersey, in the present stage of the negotiation, beg leave explicitly to state to the commissioners of the state of New-York, that the claims of New-Jersey, in the matters of limits and boundary, in difference with New-York, are as follows:

1. A right of territory and jurisdiction to the middle of the river Hudson, and the narrows, agreeably to the true construction of the original grants, and the rights acquired by the war of the revolution, and the treaty of peace, recognizing the independence of the United States.

2. Staten Island, and the three Oyster Islands, expressly included within the territory of New-Jersey, as set forth in the aforesaid grants.

3. The waters between Staten Island and the main land, the same being altogether within the limits of New-Jersey.

With the hope that some satisfactory arrangement might be made upon the basis of mutual accommodation, the undersigned have not only refrained from exhibiting their claims, founded as they believe upon the most approved principles of law, but have explicitly offered to relinquish their right to Staten Island and the Oyster Islands, and also important rights in the waters of the Hudson, so as to ensure to the city of New-York the more effectual protection of her health and commerce. They indulged the expectation that the commissioners of New-York would propose some arrangement which would not be founded on principles inconsistent with any just title in New-Jersey, in the matters in controversy. They however, deeply regret, that all the propositions offered by the commissioners of New-York assume as a basis, the ownership of New-York to the waters between the states, and merely accord to New-Jersey, as favours, certain privileges which she now fully, and of right enjoys. Under these circumstances, the undersigned feel themselves compelled to state more formally, and in writing, that they cannot negotiate upon such a basis, nor can they advance farther upon

the principles of mutual concession and friendly adjustment. They therefore submit to the commissioners of New-York, the expediency of referring the decision of the controversy to some indifferent and impartial tribunal.

And have the honour to be, with great respect, &c.

RICHARD STOCKTON,
JOHN RUTHERFURD,
THEODORE FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER.

To *John T. Irving*, *Nathaniel Pitcher*, *Samuel A. Talcott*, *Hermanus Bleecker*, and *Herman J. Redfield*, esquires.

B.

Letter from the New-York, to the New-Jersey Commissioners.

Dated 17th September, 1827.

GENTLEMEN,

The commissioners of New-York have the honour to acknowledge the receipt of a note from the commissioners of New-Jersey, of the 15th instant, in which the claims of the latter state are set forth as comprising a right of territory and jurisdiction to the middle of the river Hudson, and the narrows; a right of territory and jurisdiction over Staten Island and the three Oyster Islands, and also over all the waters between Staten Island and the main land. The commissioners on the part of the state of New-York, from a knowledge of the claims which have been heretofore set up on the part of New-Jersey, have from the beginning of this negotiation, acted under a belief that the only mode of coming to an amicable arrangement of the matter in controversy between the two states, was to proceed upon what was well expressed in your note, "the principles of mutual concession, and friendly adjustment," and that the views entertained by ourselves, and those which we suppose to be entertained by the commissioners of New-Jersey upon the strict legal question of right between the two governments were so totally at variance,

that no arrangement could be made upon such a basis. We have therefore in all the propositions submitted to the commissioners of New-Jersey, endeavoured to avoid any assertion of right on the part of New York, and to place the whole matter upon the footing of an amicable adjustment of the differences between the two states, which have heretofore produced inconveniences to both. And in those propositions it was certainly the intention of the commissioners on the part of this state, to stipulate for the enjoyment by the state of New-Jersey, of rights within the territory of New-York, the granting of which should not be "founded upon principles inconsistent with any just title in New-Jersey." But it is true that we have ever had a regard to what we consider the territory and jurisdiction of our state, although we have sedulously endeavoured to avoid embarrassing the negotiations between us, by any assertion of right incompatible with the claims of New-Jersey. If we have failed in those endeavours, we are willing that the commissioners of New-Jersey shall so correct and modify the phraseology of our propositions as to render them in this respect acceptable.

At the same time however, we must take the liberty of saying that we did suppose that those propositions contained grants of privileges to New-Jersey, which she had never enjoyed, and could only have the right of enjoying by virtue of concessions from this state. A particular discussion of those privileges in the present state of our negotiation, we do not think necessary or useful. But without going into an examination of the claims of New-Jersey to "territory and jurisdiction to the middle of the waters of the Hudson and the Narrows," the commissioners of New-York feel bound to say that they did seriously believe that the commissioners of New-Jersey would upon their own principles, consider the proposed stipulations allowing that state to serve criminal and civil process upon the waters east of what New-Jersey claims as their boundary line, as grants of new rights from the state of New-York. And as they had not understood that New-Jersey enjoyed or claimed such rights, they were not a little surprised to find that propositions granting those rights were considered by the commissioners on the part of that state,

as merely according to New-Jersey as favours, certain privileges which she now fully and of right enjoys.

The commissioners of New-York regret that the commissioners of New-Jersey cannot "advance farther upon the principles of mutual concession and friendly adjustment," for it will be impossible for us to negotiate upon a recognition of the rights of New-Jersey, as asserted by the commissioners in their note of Saturday.

We think therefore that nothing now remains to be considered, but the proposition with which that note closes, submitting to us "the expediency of referring the decision of the controversy to some indifferent and impartial tribunal." Upon this suggestion we have again perused the act of our state constituting the board of commissioners; and although we find power to make an agreement with the commissioners of New-Jersey upon the points in controversy, we do not see any authority to submit the decision of such controversy to any other tribunal.

There is however a general clause investing us with all powers which had been given by New-Jersey to the commissioners on her part, and it becomes necessary therefore before discussing this proposition, and in order to ascertain our own powers in relation to it, that we should inquire whether the commissioners of New-Jersey are authorized by the laws of that state to submit the question between the two states to any other, and if so, to what other tribunal.

We are gentlemen with respectful consideration,
your obedient servants,

JOHN T. IRVING,
NATHANIEL PITCHER,
SAMUEL A. TALCOTT,
H. BLEECKER,
HERMAN J. REDFIELD,

To *Richard Stockton*, *John Rutherfurd*, *Theodore Frelinghuysen*, *James Parker*, *L. Q. C. Elmer*, esquires, Commissioners.

C.

Letter from the New-Jersey, to the New-York Commissioners.

Albany, September 17th, 1827.

GENTLEMEN,

The commissioners of the state of New-Jersey have the honour to acknowledge the receipt of a note from the commissioners of New-York of this day, and beg leave in reply, to renew the expression of their regret that no amicable adjustment of the territorial disputes between the two states appears at present to be practicable.

In explanation of the views we expressed of the propositions made by the commissioners of New-York, as to the extent of the privileges they accorded to New-Jersey, we would remark that those views resulted from a consideration of the privileges in their connexion. The proposed benefit of executing civil and criminal process on the Hudson, was extended to both sides of the river, impairing our right to serve process on our own waters, and against our own citizens, and was so restricted in its terms, and so qualified in its general operation on the east side of the Hudson, that we could not regard it as a distinct and valuable privilege.

The suggestion as to the "expediency of referring the decision of the controversy to some indifferent and impartial tribunal," was not made by us, under the impression that the two boards could officially make it the subject of express convention and agreement. For the act authorizing the commission on the part of New-Jersey, confines our functions to the settlement of the line. But as an intimation of such a course was given by the New-York board at an early stage of our negotiation, and as New-Jersey has always been willing to submit her rights in question to such a tribunal, we presumed that as a measure of expediency, it might very properly by joint advisement, and the concurrence of the two boards, be made a fair matter of recommendation to their respective legislatures. We alluded particularly to the Supreme Court of the United States, as the tribunal to

whose consideration and judgment, we confidently believe the state of New-Jersey would submit the controversy.

RICHARD STOCKTON,
JOHN RUTHERFURD,
THEODORE FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER.

To *John T. Irving*, *Nathaniel Pitcher*, *Samuel A. Talcott*, *H. Bleecker*, *Herman J. Redfield*, esquires.

D.

Letter from the New-York, to the New-Jersey Commissioners.

Albany, September 17th, 1827.

GENTLEMEN,

In respect to your note of this evening, which we have had the honour to receive, and which suggests the expediency of submitting the matters in controversy between the two states to the decision of the Supreme Court of the United States, we beg leave respectfully to state, that although it was a subject of conversation between the members of the two boards, whether such a course might not become advisable in case of their disagreement, it was not suggested on the part of the commissioners of New-York, that we had the power to agree to such submission, or that the act of appointing us required or would sanction a recommendation to our legislature to pass any other act upon the subject.

Appointed ourselves especially for the purpose of adjusting with the commissioners on the part of New-Jersey, the differences between the two states, and having to our great regret failed to accomplish this desirable object, we think that it does not belong to us to point out to those, from whom we have derived our authority, the course which, under such circumstances it becomes them to pursue. Such we would with all deference suggest, might perhaps more properly be effected by a correspon-

dence between the executives of the two states, and by such recommendations as they might respectively make to the legislatures of each.

This we believe is the usual channel through which such recommendations are made, and the legislature of the state we represent would certainly receive a communication of that nature, with all that consideration and respect which is due to the state of New-Jersey.

We are, gentlemen, with the most respectful consideration,

your obedient servants,

JOHN T. IRVING,
NATHANIEL PITCHER,
SAMUEL A. TALCOTT,
H. BLEECKER,
HERMAN J. REDFIELD.

To *Richard Stockton*, *John Rutherfurd*, *Theodore Frelinghuysen*, *James Parker*, *Lucius Q. C. Elmer*, esquires, Commissioners.

The following facts and argument, in relation to the matters in controversy between New-Jersey and New-York, are submitted by the Commissioners of New-Jersey to the Legislature.

THE controversy between the states of New-Jersey and New-York, in regard to the eastern boundary of New-Jersey, naturally divides itself into two general heads.

First. The right of New-Jersey in the Hudson river and the other dividing waters.

Second. Her right to Staten Island.

I. OF THE RIVER HUDSON AND THE DIVIDING WATERS.

It is contended for New-Jersey, that the Hudson river and the other waters "*leading unto*" her territory, were conveyed to the proprietors of New-Jersey at least as early as the year 1682, for the purposes of "navigation, free trade, fishing, or otherwise," namely, for all other purposes to which such waters ought to be appropriated: and that this general proposition can be maintained, whether the grants under which she claims are considered merely as conveyances between individuals, and to be tested by the general rules of construction applicable to such instruments, or as grants of territory, jurisdiction, and government, made by a sovereign power for the purpose of creating a political state and constitution, and to be construed as such, according to the more liberal principles of the public law, called the law of nations.

A concise view of the origin of the English title to this part of North America, will properly precede an examination of this assertion. Sebastian Cabot, a natural born British subject, discovered the continent of North America in the year 1497, and coasted from Newfoundland to Cape Florida.

Smith, the historian of New-Jersey, remarks, that from "this discovery and voyage the English have claimed the country ever since, by the well known *jus gentium*, which declares, that whatever waste or uncultivated country is discovered, it is the

right of that prince who has been at the charge of the discovery." Several futile attempts to settle the country had been made by the British government in early times.

In 1584, queen Elizabeth granted to Sir Walter Raleigh all such countries in America as were not then possessed or inhabited by christian people, under which grant a settlement was made in Virginia.

In 1606, James I. granted a new patent of Virginia, which included within its limits New-England, New-York, New-Jersey, Pennsylvania, Delaware, and Maryland, the whole country then bearing the name of Virginia. Under this patent, a settlement was made, but its affairs were so mismanaged that the patent was declared forfeited on a *quo warranto*, after which the whole was re-annexed to the crown.

The languishing condition of these settlements attempted by the English, induced the Dutch to set up a claim to that part of the country which now includes the states of New-York and New-Jersey. Henry Hudson, an Englishman in the service of the States of Holland, was, in 1609, sent out by the Dutch India Company on a voyage to discover a north-west passage to the East Indies. He touched at New-York, and sailed up the river, which was, after him, called the Hudson. The Dutch afterwards made a settlement at New-York and in the adjacent parts of New-Jersey, and pretended that the whole territory belonged to the West India Company, under the States General. They built a fort at New-York, and another on the Delaware, laid out a garden and farm at Horsimus, and sent out many actual settlers from Holland, who took possession of large tracts of land in both states, as subjects of the States General. In the mean while, the civil war in England so engrossed the attention of the English, that the Dutch were permitted to retain their possession until after the restoration of king Charles II.

After this event took place, the plan of asserting the English title to that part of the continent into which the Dutch had intruded, was once again revived; and that it might be regained and secured, and settled by English subjects upon a large scale, it was resolved by the king and his council to create a princi-

pality in favour of the Duke of York, the king's only brother, and the heir apparent of the crown; and that, for the purpose of immediate colonization, the duke should convey that part of his domain which now constitutes the state of New-Jersey, to Lord Berkley and Sir George Carteret, two of the king's privy council. In pursuance of this great plan of colonization, the king granted all the country from Nova Scotia to Delaware bay to the duke, on the 20th March, 1664, and in June of the same year the duke conveyed New-Jersey to Berkley and Carteret.

To make these grants effectual, and to dispossess the Dutch, who were considered as intruders, an armament had been prepared, and a fleet, with troops on board, sailed from England a few weeks after the grant to the duke, that is to say, on or about the 26th April, 1664, a state of war not then existing between England and the States of Holland. This force arrived, and achieved the purpose for which it was fitted out, by dispossessing the Dutch, in the month of August of the same year, 1664, and by putting the grantees, Carteret and Berkley, in possession of New-Jersey. As soon as the news of the surrender of the country by the Dutch arrived in England, the proprietors set about their great work of settling it by English adventurers. They had not been idle from the time they received their grant, but had well considered and matured their plan. On the 10th February, 1664, (old style) in less than a year from the date of the king's grant to the duke, they published to the people of England the principles upon which they were willing to plant and govern their intended colony. On that day, under the designation of grants and concessions, they published their first state paper, offering to the settlers a free plan of government, to consist of a legislature composed of a governor, council, and assembly, to be composed of delegates to be chosen annually by the people; *a judiciary department* suited to the infant state of the colony; *a militia* for public defence, *and the general rules* to be observed in the sale, purchase, and laying off of lands.

This paper is a written constitution, and has ingrafted into it the most approved principles of English liberty. Its sole object was to invite and encourage the settlement of the colony, by the

offer of a free constitution, securing to the adventurers the blessing of civil and religious liberty. In truth it is the same substantially as that under which New-Jersey lived until the revolution: nay, it may be further said, that the present constitution of the state differs from it no more than was naturally consequent on independence of the crown of England. On the same day, 10th February, 1664, the proprietors appointed Philip Carteret their first governor.

This review of the early history of the state clearly evinces that these grants or conveyances were all made with the intent, and for the purpose of settling a new colony, of creating a new state. The duke, being the owner of a domain extending far to the east and north, grants New-Jersey to Berkley and Carteret, that *they* "*might plant a colony.*" He reserves New-York to himself, that he or his immediate agents might not only watch over and keep in subjection the foreigners who had settled the country, but mix them up with a much larger number of English subjects, and thus lay the foundation of another distinct sovereignty, to be governed by his authority under the protection of the crown of England.

The result is, that these grants are not to be considered as merely muniments of title, as private deeds between individuals, but as grants of territory, jurisdiction, and government, intended to call into existence a new people, and to create a new political state. They are all in *pari materia*, parts of the same transaction; they have the same objects; they deal with matters of state and sovereignty; they take their origin from the *jus gentium*, and must especially now upon a controversy of limits and jurisdiction between two sovereign states, be tested by the great principles of public law recognized by all civilized nations in the settlement of such disputes. The first grant of the king to the duke bears date on the 12th March, 1664. It grants to the duke, his heirs, and assigns for ever *inter alia* "the Hudson river" and all the lands from the west side of Connecticut, to the east side of Delaware bay," including the states of New-York and New-Jersey. This territory is to be holden of the crown of England, in free and common soccage.

"It also gives and grants to the duke, his heirs, deputies, agents, commissioners, and assigns full and absolute power and authority" to correct, punish, pardon, govern, and "rule according to such laws, orders, &c. as the duke or his assigns shall establish; and in default thereof, in case of necessity according to the good discretion of his deputies or assigns, as well in causes and matters capital and criminal as civil, both marine and others, so as the said statutes and proceedings be not contrary to, but as near as may be agreeable to the laws of England, saving also an appeal to the king on any judgment or sentence," &c.

It adds also the right to bring over British subjects, to exercise martial law, to make defensive war, and regulate commerce; in fine, as to this territory, it invests the duke and his assigns with all the regalia of the crown.

It creates a *sub-royalty* in favour of the duke, his heirs, and assigns, subject only to the general tie of allegiance to kings of England.

The right of the king to make such a grant to a subject cannot be brought into debate.

The kings of England, prior to the revolution of 1688, claimed and exercised that right even in England, and without the concurrence of parliament.

Such were the counties palatine of Chester, Durham, and Lancaster, granted in ancient times to distinguished individuals.* They were called counties palatine, from the words *palatio regis*, (palace of the king,) and Judge Blackstone says that the owners had "*jura regalia*" as fully as the king hath in his palace. *But as to newly discovered countries* acquired by conquest, or driving out the natives by British subjects, these were especially *assigned to the king as his prerogative*, who gave to the settlers such laws and constitutions as he pleased.† Speaking of the American colonies, Blackstone says, "they were governed either by royal or proprietary *governments*, which latter were granted out by the crown to individuals, in the nature of *feudal principalities*, with all the inferior regalities of subordinate powers of legislation which belonged *to counties palatine*."‡

* 1 Black. Com. 116 17. † Ibid. 107. ‡ Ibid. 108.

Lord Mansfield on our subject says, "after the conquest of New-York, in which most of the old Dutch inhabitants remained, king Charles II. changed the form of their *constitution and political government, by granting it to the Duke of York, to be held of his crown under all the regulations contained in his patent.**

The learned commentator Blackstone, calls the governments thus created "subordinate royalties," he considers the grants as legal, and vesting in the grantees all the powers enumerated.

In the case of Hall and Campbell, Lord Mansfield considers the king as having acquired New-York by conquest from the Dutch, and lays down the law thus, "the laws of the conquered country remain in force until they are altered by the conqueror." The Dutch laws would therefore have privilege, but he had taken care to "change their constitution and political government" by the grant to the duke. The grant of the duke to Berkley and Carteret, was to carry into effect such change, as far as related to New-Jersey, part of which had been actually colonized by the Dutch, and the whole of which was claimed by them. The proprietors were substituted in the place of the duke, according to the stipulations of the patent, and became the sub-sovereigns of the territory as fully as the duke would have been, had he made no grant. And so they remained until they surrendered the government to queen Anne.

The Duke of York being thus prince, owner, and legislator, determined to divide his vast domain, to create a new state independent of him, to be planted by others with British subjects and adventurers, to which he gave the name of New-Jersey.

This is the description of the country granted to Lord Berkley and Sir George Carteret, "all that part of land adjacent to New-England, and lying and being *to the westward of Long Island and Manhatten Island*, and bounded *on the east by the main sea and Hudson's river*, and hath upon the west Delaware bay or river, and extends the southward to the main ocean as far as Cape May, at the mouth of Delaware bay, and to the northward as far as the northermost of the said bay or river Delaware,

* Cowper's Rep. 211, Hall *v.* Campbell.

which is 41 degrees 40 minutes of latitude, and crosses thence in a straight line to the Hudson river, in 41 degrees of latitude, to be called by the name of Nova Cæsarea, or New-Jersey, "together with all the rivers, mines, minerals, woods, fishings, fowlings, &c. *and other royalties*, profits, &c. to the same belonging, in as full and ample a manner as the same are granted to the Duke of York. Upon the making of this grant, the proprietors took possession. The concessions, or constitution of February 1664, before mentioned, induced many to emigrate from England. They were published also in New-England, and the liberal plan of government established, induced many settlers to remove from those parts.* Philip Carteret came over in 1665, and as early as the 30th May, 1668, a legislative body consisting of a governor, council, and house of burgesses, elected by the people, met in general assembly.

In 1673, the Dutch re-conquered the country, but shortly after it was restored, and finally secured to the English by the treaty of peace between Great Britain and the States of Holland.

These transactions it was supposed, made it proper that new grants should be made to the duke, and to the proprietors, and accordingly in 1674, the king again granted the same domain to the duke; and he also granted to Sir George Carteret the eastern part of New-Jersey; and afterwards the western part to the grantees of Lord Berkley, in the same terms, and with the same powers as are used and conveyed by the former. Nevertheless, the claim of the proprietors *to the rights of government* were still disputed. These powers had been expressly granted by the king to the Duke, as has been already seen; but in his grants to the proprietors are to be found only the general description of "rivers, mines, minerals, &c. and other royalties," which might be satisfied without construing them to include the great powers of political government. Sir Edmund Andross, the duke's governor of New-York, denied the right of the proprietors in this respect, and went so far in the year 1680, as to send an armed force to Elizabeth-Town, which made Philip Carteret the proprietary governor a prisoner, and brought him forcibly to New-

* Smith's History 67.

York, where he was indicted and tried for usurping the king's government in New-Jersey. He was acquitted by the jury, notwithstanding all the influence of the governor and the court was employed to procure his conviction, and the conduct and proceedings of Andross were censured and disavowed in England by the king and the duke.

Meanwhile, a partition of New-Jersey had taken place, and East-Jersey had been assigned to Sir George Carteret, and West Jersey to the grantees of Lord Berkley. Conveyances had been made of East-Jersey to twenty-four persons, afterwards called the twenty-four proprietors. To free the proprietary governor from all the doubts arising out of these events, to explain the domain and powers intended to be conveyed by the former grants, which are recited, the Duke of York made a confirmatory grant in the year 1682, to the eastern proprietors. By it he alters the phraseology of the first grants in regard to rivers, which merely included rivers as appurtenances, in these general terms, "together with all rivers, &c." which might be satisfied by internal rivers. But this additional confirmatory grant adds this important section, not to be found in the former grants, namely, "and also all *islands*, forts, &c. whatever, to the same belonging. *And also the free use of all bays, rivers, and waters, leading unto, or lying between the said premises, for navigation, free trade, fishing, or otherwise.*"

"And for the better enabling the grantees to improve *and plant* the said premises *with people*, and to exercise all necessary government there, whereby the said premises may be the better improved, and made more useful to them, their heirs and assigns, he gives, grants and transfers to them, their heirs and assigns, proprietors of the said province of East New-Jersey, for the time being, all and every such and the same powers, authorities, jurisdictions, governments, and all matters and things whatsoever, which by the said letters patent were granted to the Duke of York," to be exercised as fully, and to all intents and purposes, as the duke might have done.

This last grant is a public and solemn act, whereby a former sovereign grants and confirms to a state already in existence, and

in actual possession, all the rights remaining in him, or which might be supposed to remain by reason of the inaccuracy of former grants; and it is entitled to the benefit of the same rules of construction as would be applied to a treaty of limits, boundary and jurisdiction between independent states.

It is true these grants and conveyances are not in the form of written conventions or treaties, but appear in the shape of grants or deeds of land, to take effect under the statute of uses. The duke's first grant to Berkley and Carteret, is by lease and release, and refers expressly to the statute of uses for its efficacy; and the deed of confirmation of 1682, is thrown into the shape of a deed of bargain and sale, having a pecuniary consideration, and all the words commonly employed in such conveyances.

It will therefore be proper to inquire and consider what construction *the common law* will give to the terms of this grant. The operative words are these, "all that tract of land adjacent to New England, and lying and being to the westward of Long Island, and Manhattan Island, bounded on the east, part by the main sea, and part by Hudson's river." The rule is, that the construction must be favorable to the grantee, and against the grantor.* This river and all the dividing waters *are notoriously to the westward of Long Island, and Manhattan Island*, and therefore are within the descriptive words of the grant. *The land* to the westward of these islands passed by express words. *This term* is of great extent in its legal operation, including all above, and all below the soil, and therefore embraces all the lands to the westward covered by water. Unless the words describing the land granted are rejected, New-Jersey must begin where those islands end. Nor ought they to be departed from in favour of the grantor, because he has added a general boundary, calculated to make it vague and uncertain. If a conflict exists between *a particular description*, and a general boundary, the latter ought to yield to the former, for it is an established rule in the construction of deeds, that if the granting words are sufficient to ascertain the lands intended to be conveyed, they *shall pass*, although they do not correspond to some of the particulars

* 3 Johns Rep. 375.

of the description.* Then as no doubt can exist of the intention to pass all the lands to the west of these two islands, the additional description which makes the eastern boundary to be the main sea and the Hudson, ought not to lessen or impair the benefits of the grant in favour of the *grantor*, and against *the grantees*.

But if the words of description and boundary can be reconciled, it is proper so to do. This may be effected by construing the eastern boundary on the Hudson, to mean that part of the Hudson which bounds the islands to the *eastward* of the river, then the eastern boundary of New-Jersey would be the *east*, and not the *west* side of the river, and all the words descriptive of the premises will be fully satisfied. This it is conceived was the true legal construction of these grants when they were made. But if it should be admitted that we must *now* be contented with a more restricted boundary, flowing from a construction favourable to the grantor, and against the grantees, the question will be, what land did pass, and what estate and right in these waters as connected with the land. Admitting that the river is our eastern boundary, yet not only is the land quite up to the river granted, but also the "free use of all bays, rivers, and waters, leading *unto*, or lying between the said premises, for navigation, free trade, fishing, or otherwise." These words convey not only the fee simple of the lands up to the very river, but *also a right and estate in the waters*," to secure to the proprietors the franchises of navigation, free trade, fishing, and all other liberties and privileges of the like nature, so as they might be held and enjoyed, not only without restraint, interruption, or regulation, but as of *their own proper estate*, wholly independent of the duke or his substitutes.

When any thing is granted, "all the means to attain it, and all the fruits and effects of it are granted also, and shall pass inclusive together with the thing, by the grant of the thing itself." Now the things granted are not only the land, but the "free use of the waters for navigation, free trade, fishing and otherwise."†

Water, strictly speaking, is not the subject of grant, for it is a

* 4 Mass. Rep 196 7 Johns. Rep 217. 6 Cranch, 237.

† Shep. Touch. 85. Co. Litt. 56 2 Black. Com. 36.

"moveable, wandering thing,"* and is only the subject of a temporary, transient, usufructory property. Hence no action will lie to recover water, even in a pond, watercourse, or rivulet, "but it must be for the land that lies at the bottom."

By a grant then of the use of all the waters for the purposes of navigation, free trade, and fishing, the waters, or the soil under the waters must pass, so far as at least to secure to the grantees, "the fruits and effects" of the things so granted, and to protect them in the full and uninterrupted enjoyment thereof.

1. It conveys a full right of navigation over all the waters. This means something more than the common right to navigate the sea, its arms and branches. Such a general right needs no grant to pass it; it belongs to the whole human race by the law of nature, and is so recognized by the law of nations. It means *an unfettered right of navigation* to be secured to the grantees, their heirs and assigns, not subject to restriction, regulation, or taxation by a foreign legislature, or a foreign corporation. But if New-Jersey has no property in these waters, then might New-York, by undue and severe regulations, or extravagant duties, impair, or even destroy this important franchise, and New-Jersey would be a mere tenant at will to her powerful neighbour.

2. "Free trade." How shall the grant of the use of these waters for free trade enure? It conveys these waters for the important purposes of a free and independent commerce, to and from our shores; and all the incidents of such a commerce, such as the right of building wharves and storehouses upon the rivers, and on the sides thereof, from whence such commerce is to be carried on, pass with it.

3. "For fishing." This is not a mere recognition of the general right of common fishery, which is claimed by the great mass of the people, in virtue of the common law; *but a particular right of fishery* is conveyed to the grantees, their heirs and assigns, in and upon these waters, and consequently an estate in these waters, so far as is necessary to secure this right. To this grant is also annexed the powers of government, so that the right to regulate fisheries by legislative acts also resulted to New-Jer-

* 2 Black. 18.

sey. But if New-Jersey has no right or title to the river, then none of her people can own or possess fisheries adjoining their own farms, nor could the state claim them, or even regulate them by law. New-Jersey and her people are all dependant on New-York for the enjoyment of these *granted rights.*

And what is the construction which the law will put on the words "or otherwise"? Are they to be rejected? Were they inserted through ignorance or haste? Not so: all these patents, grants, and conveyances were drawn with the utmost care and precision, under the direction of the law officers of the crown. Every word was weighed, its legal interpretation understood, and its office assigned. These superadded words were intended to embrace any reasonable rights in the waters, which, though they might not be directly within the strict interpretation of the preceding terms, (navigation, free trade, or fishing) were still of the same nature and character, and within the same reason; and all such were intended to be granted.

As this instrument also conveyed the regalia, right of government, and jurisdiction to the proprietors, that jurisdiction extended not only over the lands which formed the territory, but also over all and every matter or privilege conveyed by it, so far as was necessary to its full and *complete protection.* After this grant, it was not competent for the duke to exercise a jurisdiction, or permit others to exercise it, which might impair or destroy the rights thus granted away. But to convey to his colony of New-York an absolute right to the waters, or to extend their jurisdiction over the whole river, would at once impair the grant, by subjecting the navigation, trade, and fisheries of New-Jersey to the legislation of New-York. The duke himself could not lawfully have exercised such authority, much less could his agents, or the members of the colonial government of New-York established by him. The truth is, that after this grant of 1682, no absolute property in these waters could remain in the duke or his colony. Dr. Rutherforth, vol. i. p. 72, of his treatise on natural law, speaking of an original owner, says, "if any person besides himself may lawfully claim *to use* what belongs to him, he (the original owner) cannot have the full and free use of it."

It operates as a conveyance *and limitation of his right.* If it be asked, what is the extent of these water rights of New-Jersey; whether they extend over the whole or what part of the river; and whether they are exclusive or concurrent in regard to New-York; the answer is, that this must depend on the subject matter, the nature, and character of each of these privileges. The first, the right of "navigation," is co-extensive with the waters, but in its nature is not exclusive, because it belongs to the human race; but New-York has no right to regulate it against New-Jersey while her citizens *are on the waters*, for New-Jersey has the right to navigate all the waters by prior grant from the owner of the river. Hence it was that New-Jersey has asserted this right by statute, as often as the subject has been brought up. By the act of November 10, 1804, to incorporate the Associates of the Jersey Company, sec. 3, it is enacted, that they shall have the privilege of erecting or building docks, wharves, and piers in the Hudson river and bays, *as far* as they *may deem it necessary.** The act of 25th January, 1811, has this recital: "Whereas the state of New-York do unjustly claim a jurisdiction exclusively of the state of New-Jersey over all the waters between the shores of the two states; and whereas the citizens of New-Jersey have a full and equal right to navigate, and to have and use vessels or boats upon all the waters lying between the states of New-Jersey and New-York, in all cases whatsoever not prohibited by the constitution or any law of the United States."† The same principle is uniformly asserted in all the statutes which have been passed on this subject. New-Jersey, from its first settlement, has been in possession of and has used all these waters, as belonging to her of right, for the purposes mentioned in the grant; and as long as chartered rights and solemn conveyances stand for any thing she must be considered as well warranted in making such a claim. The use of the waters for "free trade," expressly granted, could not be satisfied or secured to New-Jersey without the right of making wharves and erecting storehouses into and upon these waters, nor without a jurisdiction at least to the middle of the river, for the protection of this property, and of

* Bloom. Ed. 128. † Rev. Laws 517 S.

our citizens engaged in commerce, their vessels, boats, and ships. This right of jurisdiction has also been expressly asserted by the statute establishing the boundaries of the county of Bergen. In the opinion of Judge Washington (as we shall hereafter shew) *this granted use*, followed up by actual occupation, has now ripened into a right of property to at least one half of the waters, because on any other principle we are at the mercy of New-York. If she has both ownership and jurisdiction up to our very shores or wharves, she might have destroyed at any time this granted "free trade" by her legislation, by exacting heavy imposts; by imposing duties for her own benefit upon all vessels going out or coming into our ports; by the creation of monopolies in favour of her own citizens, or by any other vexatious exactions or restrictions. All this she might have done from the earliest times until the adoption of the present constitution of the United States. This great national charter, and the independence and intelligence of the judiciary department, has recently been found to afford a substantial protection; but the necessity of recurring to it, furnishes a striking illustration of the condition to which we might have been reduced, and may yet be reduced in matters not within the scope of that constitution, if the high and unjust pretensions of New-York should be silently acquiesced in by New-Jersey. To give effect to these grants, we must go back to the times when they were made. All the property, rights, privileges, and consequent jurisdiction which passed when the conveyances were made, still remain, unless they have been surrendered. The constitution is a check upon New-York, but affords no aid in the construction of these instruments. Such a construction ought to be made *now*, as would have effectually secured to New-Jersey all the stipulated privileges at *the time* of the grants, and from that time to this, for on the faith of these the first colonists crossed the sea and came into the wilderness; the public faith was pledged to them in the grants and concessions that they should participate and enjoy the full benefit of the great waters *leading unto* the territory, for all appropriate purposes. They and their posterity could only be secured in these most important rights, by a liberal construction accor-

ding to the approved principles of public law, and the true interest and meaning of all the parties to this interesting transaction at the time.

Hitherto we have considered the grants of the duke of York to the proprietors, and particularly the great confirmatory instrument of 1682, as private conveyances, to be construed by the rules adopted in the construction of deeds by the common law.

But this is a narrow and confined view of the subject, and neither so correct or just as that which we shall now take. In the historical outline of these transactions which we have already traced, it is manifest that the grants of the king to the duke, and of the duke to the first proprietors, and the concessions or constitution offered by the latter to enable them to "plant the colony with people," are to be considered as parts of the same transaction, and all intended to promote the colonization and settlement of the wilderness in America. They constitute a series of state papers. The first creates a vice royal principality in the person of the duke, to whom is conveyed the regalia of the crown in respect to this territory. The others divide off that part called New-Jersey from the rest, for the express purpose of creating a new state or colony independent of the duke, with a solemn investment of all the powers of government, and subject only to a general allegiance to the crown of England. Between the two parts a great river or arm of the sea runs; it divides the one from the other, and is not only the natural boundary between them, but also the conventional boundary contemplated by the sovereign and expressly designated by his grants. The country was acquired by the British monarch *under the jus gentium*, or the laws of nations. The instruments dividing and parcelling it out among others, for the purpose of creating new colonies or states, partake more of the nature of public conventions or treaties than of private conveyances; and in questions of boundary and limits, they should be tested by the same law, which is nothing more than the application of these principles of justice and reason, to the subject which has received the sanction of the whole civilized world. To construe these solemn instruments now, otherwise than to effectuate the intent of the parties upon the

most liberal principles, and in favour of the colonists, would be a manifest breach of public faith, as we have already shewn. This great natural boundary between New-York and New-Jersey, was established with a view to public convenience, and so far from any intention to exclude New-Jersey from an equal participation with New-York, in the benefits of the dividing waters, the reverse is apparent on the face of the record which secured to us at least the use thereof, for all the purposes of "navigation, free trade, and fishing, or otherwise." And what other or different use of the waters, it may be asked, could remain or result to New-York?

In the case of Handley's lessee against Anthony,* the Supreme Court of the United States adopts one position. These are the words of C. J. Marshall, "in great questions which concern the boundary of states, where great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, we think the great object where it can be distinctly perceived, ought not to be defeated by these technical perplexities which may sometimes influence contracts between individuals." If therefore the rules of the common law as applied to these instruments, would exclude New-Jersey from the dividing waters, and confine her either to high or low water mark on her own shores, (which however we have denied to be true,) still we may claim it by the more liberal rules of national law.

Adopting the rule of this law as to river boundaries, the court says, "when a great river is the boundary between two nations or states, if the original property is *in neither*, and there is no convention respecting it, each extends to the middle of the river."†

In our case the original property was in the Duke of York. He, through the agency of his grantees, planted a colony on the west side of the Hudson, and another on the east side. The river is the boundary he gives; each then extends to the middle of the river.

We shew a convention, an agreement which accords to New-

* 5 Cranch, 382. † Ibid. 379.

Jersey the unqualified use of the river, for all the purposes of "*navigation, commerce, fishing, or otherwise.*" There is no such convention to be seen in favour of New-York; yet does she claim the entire ownership to the exclusion of New-Jersey.

If the colony of New-York succeeded to all the remaining domain of the duke, (for which she can shew no title,) could she, as representing the duke, exclude New-Jersey in the face of his own solemn conveyance and convention? In a political view, the rights claimed by New-Jersey were essential to her safety, and even to her existence as a state. How was her eastern maritime frontier to be defended against an enemy in time of war, without the right to construct works and build forts, which it might be expedient and necessary to run out into the water by artificial means? Must she ask permission first from her powerful neighbour? Until the constitution of the United States provided for the public defence, New-Jersey might have found herself dependant on her own exertions in this vital concern.

The rules laid down by the Supreme Court of the United States, are taken from *Vattel*, lib. i. ch. 22.

In section 266 of that chapter we find this rule, speaking of a river boundary he says, "if neither of the two nations near the river can prove that it first settled in those countries, it is supposed that they both came there at the same time, and in this case the dominion of *each will extend to the middle of the river.*"

New-York could never pretend to any thing more than a simultaneous colonization with New-Jersey.

Admitting that the Dutch were the first who actually planted a colony in these parts, yet that colony extended over to New-Jersey. The eastern part of New-Jersey was settled by the Dutch, at the same time that they fixed themselves in New-York, and both parts were under the same government.

This settlement, however, considered as a political state, was extinguished and destroyed by force of arms.

New-Jersey was actually conveyed away by the duke, and divided off into a separate colony in June, 1664, when the Dutch were in possession, and when the colony of New-York did not exist; so that New-Jersey seems to be entitled to all the benefit

which would accrue from prior possession, colonization, and government, against the colony or government of New-York.

Again, the same author (*Vattel*, lib. i. ch. 22. sec. 266) lays down this principle, "if a nation fixing itself on a river *has made any use* of the river for navigation or fishing, it is presumed (by the law,) with the greater certainty that it has resolved to appropriate the river to itself." If such be the rule in respect to an unappropriated river, *a fortiori* must it be so, when the *owner* of the river *expressly grants the use of the river* to a colony emigrating thither, for the purposes of navigation, commerce, or fishing. Water is not susceptible of any other ownership than for these purposes and their incidents, and a grant to a colony *for such uses* carries with it both property and jurisdiction.

This reasoning is adopted by Judge Washington, and applied to this very subject, as will be hereafter shewn. From all which it results, that by force of the grants and conventions made between the Duke of York and the proprietors, New-Jersey has a river boundary similar to that which remained for New-York, and *also a property in the water*, for the uses and purposes expressed, namely, of navigation, free trade, fishing, and for all other uses and purposes of the like nature and character, founded upon the most approved rules and principles of the *jus publicum*, by which the whole was originally acquired ; and that these rights must be extended at least to the middle of the rivers and waters. Every principle of public convenience, of justice and of reason seems to unite in the conclusion, that when two colonies are placed on each side of a great river, the river and other waters should be divided between them, in property and jurisdiction, and that each have a right over the whole for the purpose of navigation, to which they have a common title through him who made the water and the dry land for the use and benefit of mankind.

Vattel, as to jurisdiction, in the same chapter says, "the empire and jurisdiction over lakes and rivers, is subject to the same rules as property, in all the cases we have examined. Each state has naturally a jurisdiction over a part, or over the whole."*

* Vattel, lib. i. chap. 22. sec. 278.

3. But if the title of New-Jersey to the property of the dividing waters on her own shores, *ad filum aquæ*, cannot be sustained upon the reasoning before submitted, there still remains a ground which conducts us to the same result, and appears to be conclusive.

The grant of the king to the duke is not only of the whole country east, and south, and west of the Hudson, *but of the river Hudson itself in terms*, and of all other rivers, bays, and waters appertaining to the granted territory. That the king had a right to grant these waters, together with the powers of government and other regalia of the crown of England, and annex them to the principality granted to the duke in America, was never doubted in England at the time, nor in America; but on the contrary, the grant, together with all that it purports to convey, was repeatedly, and by the most deliberate acts confirmed by the kings of England, and all our titles in both states are derived from this patent. But if a doubt upon this point could be raised by New-York, the result will be the same. The duke succeeded to the crown of England in the year 1685.

If those waters *did not* pass to him by the grant of king Charles his brother, *they remained in the crown of England, and descended therewith to the duke. If they did* pass to the duke, they became re-annexed to the crown by his accession thereto. These and all the other *subordinate* regalia of the duke were merged by that event in the *supreme* royalty over all the realm of England and her foreign plantations which fell to him by hereditary succession and descent.

By the common law of England, the king, *jure coronæ*, is the owner of the shores of the sea, and of all rivers, bays, and waters in which the tide ebbs and flows.* The state of New-York can have no title nor permanent jurisdiction over these waters, unless she can produce a grant from the crown of England, conveying them to the colony of New-York or some other grantee. No such conveyance or grant can be shewn, because none ever existed. It was never the intention of the kings of England, after these waters had become re-annexed to the

* Davis' Rep. 152-5. Harg. L. T. 10, 11. 6 Com. Dig. title Prerogative 55.

crown, to grant them either to individuals or to corporations. The country was so rapidly growing into political consequence, that the impropriety of making any further grants of the great rivers and arms of the sea became palpable and self-evident.

That the duke never granted the territory of New-York, as he did that of New-Jersey, is a fact not to be disputed. He retained it, and governed it by his governors, who were his deputies and lieutenants. All the ancient grants and patents made while he was duke or king to individuals, or by the colonial government established by him, are limited to low water mark on their own shores. No grant or patent extending farther into the river has been shewn, and it is confidently believed that none such exists. The public acts done soon after the establishment of the English title, when the rights of all parties were well known, and the intention of the grants must have been fully ascertained, set up no pretension of ownership to the waters in controversy on the contrary they clearly demonstrate that in those days the colony of New-York made no such claim.

If that colony had a good title to those waters, what more proper occasions for asserting it could have occurred than when the first charter was granted to the city of New-York, and when their counties were laid out upon those waters, from that city up to Albany along the Hudson? The first charter to the city was granted in the year 1686, the year after the duke had become king of England. It gives the city boundary, and assigns to it "all Manhattan Island, and extends it in and upon "all rivers, rivulets, creeks, waters, watercourses" *as far as low water mark*, that is to say, low water mark on their own shores.

In 1708, another charter was granted, the object of which seems to have been, to take in "the vacant and unappropriated land on Long Island from high water mark to low water mark, fronting the said city." It meddles not with the dividing waters.

As early as 1683, an act or ordinance had passed laying off several counties, and ascertaining their respective boundaries. But the settlement of the country had been so rapid, that in 1691 it was found necessary to revise this act, and establish the county boundaries by an act of the colonial legislature. This

being a *revised statute*, was unquestionably well considered, and therefore is of great weight, for if in the infancy of the colony, when this matter was comparatively of small importance, any mistake had been committed to the prejudice of the just claims of New-York, it would have then most certainly have been corrected: yet the county boundaries, then again a second time prescribed, are all based upon the principle, that New-York had no claim to the waters on the New-Jersey side.

In this statute,* the city and county of New-York are located. The city is declared to contain Manhattan's Island, Manning's Island, the two Barn Islands, and the three Oyster Islands, "to be called the city of New-York, and the rest of the islands, the county of New-York." The city and county of New-York are thus placed on their own side of the waters. But if the legislature of New-York had then supposed that the claim now set up against New-Jersey was valid, would it not then have extended the boundaries of the city and county to the west side of the Hudson?

So the counties of West Chester and Dutchess, running from the county of New-York, up the river towards Albany, are expressly located on the east side of the Hudson.

But when they get up beyond the north boundary line between the two colonies, from the Delaware to the Hudson, namely, when they had a right to pass over to the west side of the Hudson, then, and not till then, do they attempt to lay out counties on the west side of the river.

The statute declares the county of Orange to begin on the New-Jersey line, "on the west side of the Hudson, and to extend to Murderer's creek, and westward, into the woods, as far as Delaware river."

So the county of Ulster is laid off on "the west side of the river from Murderer's creek, near the high lands, to Sawyer's creek."

And the county of Albany is to extend, on "the west side of the Hudson, to the outmost end of Saratoga." This public sta-

* Smith's and Livingston's Ed. N. Y. Laws, 6, 7, title City and County of New-York.

tute is decisive of the opinion then entertained of the true boundary of the province of New-York. It is a legislative declaration —a public, contemporaneous exposition, made by the king's representative and the colonial legislature, upon the very point in controversy; proving beyond all doubt, that when this law was enacted, New-York made no claim to the ownership of these dividing waters.

This statute is taken from the edition of New-York Laws published in 1753, by Chief Justice Smith and the late Governor Livingston, then men of eminence at the bar of New-York.

The first gentleman was the celebrated William Smith, afterwards chief justice, under the king, of New-York and of Canada. The standing and exalted character of Governor Livingston are matters of history in New-Jersey. It never could have occurred to them, that so important a right had been relinquished by the province of New-York, or they would have pointed it out. That no such opinion was entertained by those great men is manifest.

Shortly after the publication of these laws, the same Mr. Smith also published a history of New-York, that is to say, in 1756. Not only in his character of *revisor* of the laws, but especially as *the writer* of a history of the colony, from its first settlement, he must have carefully examined all the existing grants, patents, and documents in relation to the territorial boundary of the country he was about to describe; and these are his words of description—"The province of New-York *at present* contains Long Island, Staten Island, and the lands on the east side of Hudson's river to the bounds of Connecticut." This is a very cautiously worded definition of boundary. The significant words "*at present*" were probably introduced because he intended to include Staten Island, which the learned historian well knew was not anciently or rightfully a part of New-York, but had been gained by usurpation; and he probably supposed, by long possession, might *then* be called a part of New-York. But if he had entertained the slightest opinion, that the province whose history he was writing, and whose territorial limits he was describing, included the whole of the great river Hudson over to high or low water mark on the western side, and the bay of New-York and

all the rest of the dividing waters, would he have committed against New-York so gross and injurious an error as to limit her to the eastern side of the Hudson and be silent as to the ownership of these important waters? There is every reason to believe that he would not. The truth is, that until a whole century had passed away, no attempt was made to extend the counties of New-York over to the west side of the Hudson, south of the north partition line. It seems that in the year 1768, the legislature of New-York again took up the location of their counties, and made a sort of feeble conditional assertion of right, by new modelling West Chester, and adding to it all that part of the river Hudson which adjoins the county of West Chester, "and is to the *southward of the county of Orange, or so much as is included in this province.*" This must *now* be regarded as a disguised entering wedge, which *then* perhaps excited but little attention, but it fully proves that even *then*, in 1768, the legislature of New-York was not prepared to take the bold ground which they have since occupied. They do not hazard the direct assertion that the west side of the Hudson, south of Orange county belonged to them; they only venture to extend the jurisdiction, *provided* it belongs to them, which is about as effectual, and not more so, than would have been an enactment of the legislature of New-Jersey, if it had declared that the boundary of the county of Bergen should extend over the land from the east side of the Hudson, to the north side of the East river, or to so much thereof as is included in this province of New-Jersey.

In accordance with this non-claim on the part of New-York, was *the actual possession.* The possession of waters can only be made manifest by their use, and by the overt acts done upon their shores. The use of these waters for navigation, commerce, fishing, and for all the purposes to which water can be applied, had been in the proprietors and inhabitants of New-Jersey from its first settlement, without interruption or disturbance from New-York ; and the possession thus taken of our half of the river still continues. The fisheries all along the Bergen shores, carried out to the middle of the river, or as far into it as it was beneficial to go, have existed beyond the memory of man, and still ex-

ist without any effectual opposition having been made thereto by New-York.

The proprietary governors of New-Jersey, and the board of proprietors after its establishment, exercised every act of ownership of which the subject matter was susceptible.

As early as 1669, Governor Carteret granted a licence to Peter Heifelsen, to be the only and common ferryman from Communipau to New-York.

In 1678, a ferry license was given by the same governor to Job Simerson, between Bergen, Communipau, and New-York.

Other licenses of the same nature were given for ferries between the shores of Bergen county and New-York.

In 1733, Governor Crosby, as governor of New-Jersey, (being also governor of New-York,) granted to Archibald Kennedy, esquire, one of the king's council in New-York, and also receiver general of the king, a license for a ferry from Bergen to New-York.

In 1746, this same king's councillor and receiver general, Archibald Kennedy, made a survey and location *of Bedlow's Island*, under a warrant from *the eastern proprietors.*

He also made a similar location of the farm at Horsimus, which was called the Dutch West India Company's Garden, and might have been supposed to have been acquired personally by the king; as that company acted in a public capacity as governors of the country, while it remained under the dominion of the Dutch, and he exercised all acts of ownership on the adjacent waters under his New-Jersey title.

Powles' Hook, Hoboken, and all the Bergen shore was located in like manner under the eastern proprietors, and the owners have, time out of mind, erected wharves and storehouses, and cleared fisheries beyond low water mark as far into the river as they judged it expedient to go.

Upon the recent purchase of Powles' Hook by the Jersey Company, they built wharves which extend into the river far beyond low water mark. The corporation of New-York prosecuted two of the company who were found in that city, for an

alleged trespass, but have permitted the suit to remain untried for twenty years.

Upon this suit the question now in agitation would have arisen, and might have received a judicial trial and determination. But the corporation have declined a resort to an impartial tribunal, and the wharves, and others since erected, remain undisturbed.

It is, however, true, that in the year 1730, Governor Montgomery of New-York, granted another charter to the city of New-York, in which an attempt is made to carry the bounds and jurisdiction of the corporation to the west side of the Hudson.

The words having this operation are these; after running to Red Hook, a line is given "*from thence across the Hudson to low water mark on the west side, or along the limits of the province to a point opposite to West Chester.*" This contingent provisional extension of the city bounds, is liable to the observation already made in regard to the new boundary given to the county of West Chester in the year 1768, which was probably borrowed from this charter, and is no evidence of either title or possession. If the true limits of the province did *not* carry them over to the west side of the Hudson, then they have no right to exercise any jurisdiction there, but must necessarily stop at the true western line, which is the middle of the river, and from thence run up their side of the waters until they come opposite to their beginning at King's bridge.

This charter of 1730, is the only public document or private conveyance, which purports to convey any rights on the New-Jersey side of the Hudson; and as it appears to be mainly relied on by the corporation of New-York, it may merit a more full examination. It was granted by the king's governor of New-York, in the reign of George the II. and is brought up against New-Jersey as a muniment of the title of New-York to the whole of this river. The question is, whether the crown of England ever did grant the property of this river to New-York after it became re-annexed to the crown? It is not, to whom the king granted *the supervisorship or custody of this royal river*: and unless this charter does legally grant the river to the corporation

in full propriety and ownership, it can have no influence on the matters in dispute. Our construction of this instrument leads us to conclude with confidence that it is no legal conveyance of the river, but that the same remained afterwards, and until the revolution, a part of the domain of the kings of England in their political capacity.

It may well be asked at the outset, what right the governor of New-York, or even the legislature of New-York, could possess in 1730, to convey this river to a corporation. It is a great river, an arm of the sea. It was essential to the navigation, the commerce, the defence and safety of an important royal colony. The king of England could only be the owner of the river as king, by his prerogative.

The character of these waters had essentially changed since they had been first conveyed to the Duke of York. *Then* they belonged to *a newly discovered country*, just acquired "by conquest, or driving back the savage natives," and as such by the received law of nations, as well as by the common law of England, might be granted by patent, or ceded by treaty to whom the king saw fit, and upon this principle it is that the river was conveyed and passed by the letters patent of 1664, from the king to the duke.

But this river had resulted again to the crown of England; and when this pretended conveyance was made in 1730, the territory on each side thereof had been settled by British subjects, and had grown into great and powerful colonies, parcel of the dominions of the kings of England, governed by the common law of England, and by the statutes enacted by their own legislatures, and entitled to all the benefits and privileges of the mother country. The revolution too in England of 1688 had been effected, and by it the prerogative of the crown had been reduced and confined within reasonable bounds.

The great principle, that the king was the agent and trustee of the nation, was fully established.

In the first year of the reign of queen Anne, an act of parliament had deprived the crown of the power of granting its domains for a longer period than thirty years. After this great event

had happened, no attempt was ever made in England to grant the ownership of rivers on the sole authority of the king.

It may be well doubted whether king George himself could lawfully have granted away the ownership of this great river. That his deputy or governor of New-York, or his colonial legislature were incompetent to it, must be manifest to all. If then this river, and these waters could not be legally granted after they became re-annexed to the crown, had the charter in terms conveyed to the corporation "*solum et fundam*" of all them, the same had been void *ab initio*. The sentence of the law, even upon such a grant from the king, would have been, "that the king was deceived in his grant."

But such was not the intention of this charter. There are no words of grant to be found in it, conveying the soil and ownership of these waters. The instrument contains *a mere description of boundary for the city of New-York*, and those words which betray a sinister attempt to extend its limits over to the west side, can legally operate only to place the river *under the supervisorship* of the officers of that corporation.

To this end, the charter grants that the mayor of the city for the time being *shall be bailiff and conservator* of the North and East rivers. In speaking of this instrument in 1807, the commissioners of New-York add, as a fact, that accordingly "all arrests on these rivers were made by the mayor, (not the corporation) as *water bailiff*, and the process for that purpose was directed to him."*

Lord Hale, in his celebrated *Treatise de Jure Maris*,† explains to us the nature of the office of water bailiff, and recites the old cases which might have given rise to this charter of 1730. "The office of water bailiff (says Lord Hale) or scrutator, is a bare ministerial officer, which the king doth, or may appoint, in those rivers or places which *are his in franchise or interest*, and *his* business is to look to *the king's rights*."

Again he says—"The office of conservator of rivers, we find mentioned in the statute of the 1st of Elizabeth, ch. 17, and by a grant made to the city of London, and confirmed by the par-

* Vid. Rep. p. 9. † Ha. L. T. 23.

liament of 17 Richard II. ch. 9, the conservancy of the river Thames, from Stainsbridge to Medway, is granted to the mayor of London."

We then see that as early as the reign of Richard II. a grant was made, and even confirmed by the legislature, to the London corporation, similar to that of 1730, set up by New-York. Nay Sir John Davis, in speaking of this charter, calls it *a grant of the river Thames* to the corporation of London. But it was soon discovered that even *a general grant of the river*, and of *the supervisorship*, did not pass the river itself, and the corporation were obliged to surrender the grant, and purchase another. These are the words of the reporter:—"The city of London, by a charter from the king, *hath the river Thames granted to them*, but because it was conceived that *the soil and ground* of the river *did not pass* by that grant, they purchased another charter, by which the king granted to them *solum et fundam* the soil and bottom of the said river, by force of which grant the city to this day receives rent of those who fix posts or make wharves or other edifices *on the soil of the river*."*

This is without doubt the law, and the case is expressly in point. It is founded on a known and well established axiom of the common law, "that the king's grants shall pass nothing by implication. "This rule was laid down, and acted upon, as the true and ancient rule in the great case of the royal fishery on the river Banne, in Ireland, in the reign of queen Elizabeth. Davis gives us the third resolution of the court thus:—"It was resolved that no part of the royal fishery passed *by the grant of the land adjoining, and by the general grant of all fisheries*, for this royal fishery was not appurtenant to the land, but a fishery in gross and parcel of the inheritance of the crown by itself, and general words do not pass *such special royalties as belong to the king by his prerogative, for the king's grant shall pass nothing by implication.*"

Nor would this supervisorship of the river in this case be evidence, even of actual possession of the whole river. It was about the same time that the corporation of Bergen asserted

* Davis Rep. 154. Ibid. 157.

their supposed rights to the river, under their grant from the proprietors, by appointing "water bailiffs," who also had granted to them the supervisorship of the waters from the western shore to the deep waters of the channel. As water bailiffs, it was made their duty to apprehend offenders on those waters; and in the execution of their office they did apprehend men from the *colony of New-York* fishing on the flats.

In the year 1721,* the proprietor of Pennsylvania claimed either the whole or a part of the river Delaware, before the lords commissioners of trade and plantations; a board created in England to receive and report to the king and council, in all cases of limits and boundary arising in the colonies. This tribunal referred the claim to the king's attorney and solicitor general, Sir Robert Raymond, afterwards chief justice of England, and Sir Philip York, afterwards Lord Chancellor Hardwick.

These great law officers of the crown, reported, that having heard what was alleged by the council for the proprietor of Pennsylvania, and having examined the grants of New-Jersey and Pennsylvania, they were of opinion "*that no part of the Delaware river*, or the islands lying therein, were within *the granting words of the patents and grants*, but that the right to *the same still remained in the crown.*"

Upon the whole, it is manifest that New-Jersey always claimed, used and possessed the one half at least of the dividing waters; and if upon the true construction of the grants, the said waters did not pass, they remained in the crown at the era of the American revolution.

Then the remaining inquiry is, on whom they devolved in consequence of that great event. The answer which we give, is that the ownership and jurisdiction of and over these waters became vested in the two states between which they flow; each having title on her own shores, and to the *filum aquæ*, or channel of the waters. The principles already established conduct us at once to this result; for if these waters belonged to the Duke of York when he became king, and were by that event re-annexed to the crown by his accession thereto; or if they did not

* 1 Chalmer's Opinions 50

pass by the patent to him, but remained always in the crown, and continued so until the revolution, then it is but a case of conquest by joint arms, and the cession and release of the crown of England contained in the treaty of peace of all territorial rights, would enure to the common and equal benefit of the two states of which the river was the boundary, and which had been always in the possession thereof, and had time out of mind, used and occupied the waters for all the purposes to which such waters can be applied.

In such a case, each of the said states is entitled to one half of the dividing waters from its own shore, unless one could shew a prior and better title to the whole. We have already shewn that these waters were no parts of the territory of the province of New-York. Neither the king or the duke granted the same to that colony, nor had it ever any exclusive possession.

But the Duke of York did grant to New-Jersey the use of these waters for all the purposes for which they could be used; and possession had followed and accompanied the grant. Even the residue of the waters not granted to New-Jersey would not have resulted to the state of New-York at the end of the war, without the aid of this principle; *because they were no part of her former territory*, but part of the domain of the crown, merely flowing between the two states. It cannot be justly alleged or maintained that the state of New-York is entitled to all the property, franchises, and privileges which remained in the duke after his conveyances to the proprietors of New-Jersey. All these, the remaining regalia of the duke, reverted to the crown of England. New-York acquired by the revolution, only the territory *which belonged to the colony*. She did not, and could not legally acquire more than one half of those waters which remained in the crown, and flowed between her and the state of New-Jersey. Before the revolution the actual use of the waters was common to the people of both colonies, then subjects of the king. The king by his agent or water baliff was in possession for the benefit of his people. The only rights on these waters which did not belong to the crown, were such as the duke

had granted away before he became king. He had granted to New-Jersey as we have shewn, all waters leading unto her territory for the purposes "of navigation, free trade, fishing, or otherwise." But he had made no grant to his colony of New-York of any part thereof. He retained them in his own hands. Hence it is manifest that New-Jersey had a better title to the half which she claims before the revolution, than New-York had to the other half, and the revolution has fully confirmed and established it. New-Jersey had grants, use, and possession. New-York had nothing more than such a general use, as the subjects of the same king must necessarily have of the waters appertaining to his crown.

In the case of Corfield and Carral,* decided in the Circuit Court of the United States for the Pennsylvania district, a similar question arose. The state of New-Jersey had by legislative act, undertaken to regulate the fisheries in the bay of Delaware. The right to pass this statute was controverted, and the old grants to and from the Duke of York were before the court for consideration. On the sixth of August, 1680, the duke made a deed of confirmation of West Jersey to Penn, Byllinge, and others, of the same purport and tenor as that which he afterwards made to the twenty-four proprietors of East Jersey ; in which we find the same additional words of grant, to be found in the last mentioned conveyance ; namely, "and also the free use of all bays, rivers, and waters leading unto, or lying between the said premises, or any part thereof, for the purposes of navigation, free trade, fishing, &c."

It is to be remembered, that there is a most important diversity between the claim of East Jersey against New-York to one half of the dividing waters, and the claim of West Jersey to one half of the bay and river Delaware; in this, that the king's grant to the duke, makes this bay and river his western boundary, running him up the eastern shores thereof, to the most northerly point of that river, so that no part of this bay and river is included in the words of the grant, according to the opinion of the attorney and solicitor general of England, before recited. Judge

* Vid. National Gazette, May 3d, 1825.

Washington, in his comment on these grants says, "in this state of things, the revolution was conducted to a successful issue, when his Britannic majesty relinquished all claims, not only to the government, but to his proprietary and territorial rights to the same. The right of the crown to the bay and the river Delaware being thus extinguished, *it would seem to follow, that the right claimed by New-Jersey in those waters was thereby confirmed, unless another state could shew a better title.* Whether the claim of New-Jersey extended to the *middle of the bay*, as we see it did by the compact with Pennsylvania to the middle of *the river*, is a question we have no means of solving, but that the proprietors and inhabitants *made use* of the bay, both for navigation and fishing, can hardly admit of a doubt. *This right is indeed expressly granted by the duke, by the grant of the 6th August*, 1680."

It contains a grant not only of all bays and rivers to the granted premises belonging, but also the "*free use of all bays and rivers leading unto the granted premises, for navigation, free trade, fishing, or otherwise. The only objection which could have been opposed to those acts of ownership under this grant, was, that the duke had himself, no title to the bay and river Delaware under the royal grant to him.* But the inhabitants enjoyed those privileges. *The use of the bay and river* amounted to an appropriation of the water so used, (Vattel lib. i. ch. 22, sec. 266) *and this title became indefeasible by the treaty of peace, except as against some other state having a better title.*"

These are the sentiments of this distinguished jurist, and surely if the *mere use* of the waters of the Delaware bay, under a grant *which the duke had no right to make*, was such an appropriation of the waters as was *ripened into an indefeasible title by the treaty of peace ;* much more so must the same use of the waters between New-Jersey and New-York, which unquestionably did pass *by the king's grant to the duke.* Pennsylvania acted on this principle, and from a sense of justice, and a conviction of the equitable claim of New-Jersey to one half of the Delaware, divided with her upon the most liberal terms.

Upon some, or all of these grounds, we think that the claim

set up by the legislature of New-Jersey to one half of the dividing waters, is fully sustained, both on the principles of municipal and public law. The great principles of justice and equity too, which should govern in contests of boundary and limits between independent and friendly states, come in aid of the legal title.

To the acquisition of a full property in these waters, New-Jersey contributed her full proportion of blood and treasure. In consequence of her restricted northern boundary, she obtained not an acre of the vast territory which was divided among the states after the revolution. New-York gained by it *a mighty empire,* and now in her strength, she attempts to make us dependant on her for the common privileges of the waters which wash our shores, and that in the face of solemn grants and conventions, expressly conveying those privileges, upon the faith of which New-Jersey was first colonized and settled by our ancestors.

II. Of Staten Island.

The right of New-Jersey to Staten Island, and the small islands contiguous, rests upon the plain terms and true import of the original grants before cited. Staten Island, Long or Napau Island, and Manhitas or Manhattan Island, were all well known by these names before the making of those grants. Long and Manhattan Islands, belong by their natural positions to the territory on the east of the Hudson, and Staten Island manifestly to that on the west of that river. A bare inspection of the map therefore, shews that "the tract of land lying and being to the westward of Long Island," necessarily includes Staten Island. Had it been intended to exclude Staten Island from the grant to Berkley and Carteret, it would have been named, as well as the other islands, and the grant would have been of "the tract of land lying and being to the westward of *Staten Island* and Manhitas Island." The entrance into the North river through the Narrows, was well known to be along the western shores of Long and Manhattan Islands, and was much more likely to be assumed as the boundary between two states, de-

signed to occupy the opposite banks of that noble river, than a narrow circuitous channel, not navigable throughout by vessels of burthen. And however that may have been, we think that the terms of the grant are too plain to admit of more than one interpretation, without doing them great and unnecessary violence.

The subsequent words of description, "bounded on the east, part by the main sea, and part by Hudson's river," appear to us not to conflict with, but rather to confirm this construction, and equally so, whether the Hudson be considered as properly commencing at the Narrows, or at its confluence with the East river. The waters between Staten Island and the main land are not a part of the river Hudson, nor are they what is technically meant by the term "main sea." They are in fact, rivers and bays, through which the waters of the Hackensack, Passaic, and Raritan flow into the main ocean. The grants are drawn up with great technical precision, and no doubt by eminent conveyancers, under the inspection of the law officers of the crown. The language employed, should therefore be understood according to its true legal import.

But the waters in question are not what is called "main sea," either in legal or in common language, and were never so designated. A part of them was called by the Dutch, *Kill Van Kull*, or river of the bay, and a part *Achter Kull*, or black bay, since corrupted to Arthur Cul's bay. To the west of the Kills, the Sound is described in the Indian deed to the Elizabethtown people, made October 28th, 1664, as "the *river* that parts Staten Island and the main."

Governor Nichols, in his confirmation of that deed, made the ensuing December, it is true, changes the word "river," to "sea;" whether *ex industria*, or accidentally, can only be conjectured. Be that as it may, there is a well known distinction in legal and in common language, between the expressions *sea* and *main sea*. The Monmouth patent granted by Nichols, April 8th, 1665, describes the land granted, as "beginning at a certain place, commonly called or known by the name of Sandy Point, and so running along the *bay*, west north-west, till it comes to the mouth of the Raritan river, &c." No grant or geographical

description known to us, designates any part of the waters between Staten Island and the main land as the "main sea," nor can we persuade ourselves that they are intended by this expression, in the grants of the Duke of York. If the phrase was not meant as we suppose to be synonimous with main ocean; the arm of the sea, from the Narrows to the confluence of the North and East rivers, is much more likely to have been intended, and much better answers the description than a narrow and shallow sound.

Notwithstanding the plain import of the grants, it is unquestionable that New-York has possessed Staten Island, and the other small islands from the first organization of her government. Had this possession been undisputed, time might have ripened it into an undisputed title. But New-Jersey has always protested against it, and embraced every fit opportunity of asserting the superior validity of her claim, and of endeavouring to obtain possession.

A careful examination of the history of the disputes between the two states respecting their boundaries, will fully shew this, and will serve also to demonstrate that the early possession of New-York was not owing to a contemporaneous construction of the grants, satisfactory to the parties concerned, but is explained by other circumstances. The long continued possession then, having been wrongful from the first, and always resisted, the lapse of time has served only to increase the injury.

If it were conceded that possession, under such circumstances, could establish a right, surely that right must be confined to the strict limits of the possession. Now the waters which separate Staten Island from the main land are not, and never have been included within the limits of Richmond county, nor are they treated by any law of New-York as within her jurisdiction. On the contrary, a part of them, at least, has always been under the exclusive jurisdiction of New-Jersey. Colonel Robert Hunter, the governor of both states, on the 4th August, 1718, granted a charter to Perth-Amboy, under the great seal of the province of New-Jersey, by which he fixes the bounds of the city at low water mark on the Staten Island side of the sound, without re-

striction, and without the intimation of a doubt that the limits of the province extended so far. Under this charter, Perth-Amboy was a port of entry under the king of England; it was declared a free port by the state of New-Jersey in 1784, and so continued until the adoption of the federal constitution, and has been a port of entry ever since, under the act of congress: and the municipal authority of the corporation has always been exercised over the waters contiguous. The waters of the sound and Kill Van Kull have never been claimed by New-York, and this fact is admitted by the commissioners of New-York, in the correspondence of 1807.*

In addition to the article under the first head, it may be remarked, that in the correspondence between the commissioners on the part of the two states in 1807, it is asserted by the commissioners of New-York,† "that from their earliest recollection, there has always been a reputation, or understanding, that the whole of the waters of the river Hudson and of the bay between Staten Island and Long Island were within the actual jurisdiction of New-York;" though there was "no precise reputation or understanding either way, whether such jurisdiction extended to high water mark, or was confined to low water mark, on the shore of New-Jersey." It is admitted, however in the same breath, "that the citizens of New-York and New-Jersey had a free and common use equally of the waters in question, to take fish within the same, and for every other purpose." The understanding of actual jurisdiction asserted, is contradicted by the fact of use and occupation by New-Jersey; and it appears from this admission, that the people of New-Jersey have always, in the words of the grant from the Duke of York to the twenty-four proprietors, in 1682, enjoyed "the free use of all bays, rivers, and waters leading unto or lying within the province, for navigation, free trade, fishing, or otherwise," and that this included the North or Hudson river among the rest. They have,

* Report p. 28. † Ibid.

on the Hudson river, from Staten Island northward, and directly opposite to the city of New-York, built wharves extending far beyond low water mark, established ferries, and thus occupied the waters; as also by fishing with seines, fykes, and weirs without interruption, and in various other ways claimed and exercised acts of ownership in and over the waters in question.

After the adoption of the federal constitution, congress, on the 4th August, 1790, passed the act dividing the states into districts for the collection of revenue* &c., in which they enact, "that the district of the city of New-York shall include such part of the coasts, rivers, bays, and harbours of the said state not included in the district of Sagg Harbour." And they enact also, "that the district of Perth-Amboy shall comprehend all that part of New-Jersey known by the name of East New-Jersey, (that part excepted which is included in the district of Burlington) together with all the waters thereof heretofore within the jurisdiction of said state, in which district the towns or landing places of New-Brunswick, Middletown-Point, Elizabeth-Town, and Newark shall be ports of delivery, and a collector for the district shall be appointed, to reside at Perth-Amboy." Under this act, all vessels belonging on the west side of the Hudson river south of forty-one degrees of latitude, were enrolled and licensed at Perth-Amboy, as belonging to "waters theretofore within the jurisdiction of New-Jersey," by which words the jurisdiction of that part of the Hudson or North river was assigned to the collector of Perth-Amboy in New-Jersey. By another act of congress,† passed 8th March, 1806, it is enacted, "that the town or landing place of Jersey shall be a port of delivery, to be annexed to the district of Perth-Amboy, and shall be subject to the same regulations and restrictions as other ports of delivery in the United States." After the passage of this act, vessels bound to and from foreign ports laded and unladed at Jersey, clearing and entering at Perth-Amboy, and vessels from New-York, merely crossing the North river, cleared at New-York for Jersey, entered at the collector's office at Perth-Amboy, and under his clearance sailed from Jersey to foreign ports. It thus appears that by the act of 1790, giving to the collector of New-York

* Vol. i. 246. † Vol. viii. 23.

jurisdiction over all the coasts, rivers, bays, and harbours of the said state, no jurisdiction passed or was claimed of the waters on the west side of the Hudson contiguous to New-Jersey, while by the same act the assignment to the collector of Perth-Amboy of all the waters theretofore within the jurisdiction of New-Jersey passed the control of those waters as such, and as such they were occupied without opposition.

As the port of Jersey was twenty-five or thirty miles distant from Perth-Amboy, and great inconvenience was thereby occasioned in entering and clearing vessels, an application was made to congress to make Jersey a port of entry. This was opposed by the secretary of the navy, as being too near New-York; and by his suggestion, a plan was adopted to annex Jersey to the port of New-York; this plan, being first sanctioned by express consent of the state of New-Jersey, manifested by resolution of the legislature directed to her senators and representatives in congress. An act was passed by congress,* March 2, 1811, by which it is enacted, "that all that part of the state of New-Jersey which lies north and east of Elizabeth-Town and Staten Island, be, and the same is hereby annexed to the district of New-York; that an assistant collector, to be appointed and commissioned by the president of the United States, shall reside at the town of Jersey, who shall have power to enter and clear vessels, in like manner as the collector of New-York is authorized to do, but such assistant collector shall nevertheless act in conformity to such instructions and regulations as he shall from time to time receive from the collector of New-York." Under this act, the control over the waters of the Hudson, previously exercised by the collector of the port of Perth-Amboy, as part of New-Jersey, passed to the control of the collector of New-York and his assistant at Jersey. The words of the acts of 1790, 1806 and 1811, and the proceedings and practice under them fully sustain the fact, that before the year 1790, and since that time, New-Jersey possessed jurisdiction over the waters of the Hudson opposite her shores. By the last act for collection of revenue on imports and tonnage, and by consent of New-Jersey the jurisdiction is changed, but it is changed for no other purpose.

* Vol. 3. 361.

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